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Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

Donald R. Lewis
Petitioner

Vs.

Department of Agriculture
Respondent

On Petition For A Writ Of Certiorari To United States
Court Of Appeals
For The Federal Circuit

Petition For Writ Of Certiorari

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Pro Se

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Questions Presented

1. Did the Respondent commit harmful procedural error under 5 USC 7701 (c) (2) when it violated its own procedural guidelines for misconduct investigations and reports and caused substantial prejudice to Petitioner's individual rights by affecting the Agency's decisions, violate Petitioner's due process rights, and deprive him of Equal Protection under the law when taking away his employment interest after over 36 years of Federal Service with no disciplinary record, a history of the highest/near perfect performance rating, 2 years in the U.S. Army by way of the draft during the Vietnam War with an Honorable discharge and Letter of Appreciation from General William Westmoreland for his war time service? Further, did the Appeal Court and Merit Systems Protection Board violate the same stated rights and abuse their discretion when they failed to find harmful procedural error? Petitioner and all employees should be provided the protection of the procedural guidelines. Additionally did they ignore the prohibited personnel practice committed when the Respondent sought to force Petitioner to sign a fraudulent position description, initiated the 40 year plus Investigation that he was subjected to thereafter, and removal?

2. Did the respondent violate Petitioner's Due Process Rights, Fifth Amendment of The U.S. Constitution, Equal Protect Under the Law, and the wrongfully taking away of his protected property interest in his employment under the U.S. Constitution's Fifth

Amendment by refusing and failing to provide requested needed specifics such as descriptive details of alleged conclusory comments about employees weight, and dates, times, and places of the alleged inappropriate comments and then charging him with making false statements during an official investigation when he would not agree with the statement presented under the vague, conclusory, and non-specific charge? On the same issue, did the Respondent violate its own procedural guidelines which states "the report should tell a story of what happened, who was involved, when and where it happened and why it happened? Further, did the Board and Appeal Court violate the same rights of Petitioner and improperly shifted to Petitioner the burden of proving that he did not make false statements during an official Investigation? All American citizens deserve above protections.

3. Did the Appeal Court and Merit Systems Protection Board abuse their discretion, violate Petitioner's due process rights, and deprive him of Equal Protection of the Law by substituting a new charge to replace "directing" after the hearing in order to find for Respondent?

4. Did the Appeal Court and Merit Systems Protection Board abuse their discretion, violate Petitioner's due process rights, and deprive him of Equal Protection of the Law by adding a new charge of "pattern of conduct over time" after the hearing in order to find for Respondent and seek to justify the Respondent's

inability to provide Petitioner with needed detail descriptive specifics and dates, times, and places of alleged incidents and alleged conclusory, vague comments? Failure to provide such violates Respondents own procedural guidelines.

5. Did the Board violate Petitioner's Due Process Rights and right to Equal Protection under the Law when it made the erroneous and biased general demeanor/credibility finding on page 10 of its initial decision and then using the same to harm Petitioner on credibility and findings for the remainder of the decision and in wrongfully taking away his property interest in his employment under the 5th Amendment of the U.S. Constitution? Did the Appeal Court violate the same rights of Petitioner and abuse its discretion in deferring to the Board's erroneous demeanor/credibility findings including such error as failing to describe Petitioner's carriage, behavior, manner, and appearance? Did the Appeal Court and Board abuse their discretion and violate Petitioner's due Process Rights, Equal Protection Under the Law, and the wrongful taking of his employment by failing and refusing to address the issues under Seavello v. Department of Navy, 4 MSPB 239 (1980), and the prohibited personnel practice of seeking to force him to sign a fraudulent position description and reprisal for his failure to do so?

7. Did the Respondent violate Petitioner's rights to Equal Protection Under the Law, due process rights, and Fifth Amendment of the U.S. Constitution by

charging him with unintentional/negligence and then applying the element of intent in reaching the penalty of removal? This would allow an organization to take away employees employment rights without proving the element of intent. Further, did the Appeal Court and Merit Systems Protection Board violate the same stated rights and abused their discretion when they sustained the findings and penalty of removal? Respondent never refuted that they knew Petitioner was being paid the compensatory time for over 10 years in the manner processed by responsible timekeepers?

8. Did the Appeal Court and Merit Systems Protection Board abuse their discretion and deprive Petitioner of Equal Protection of the Law by sustaining a specification of catching J. Nguyen's arm as inappropriate conduct when she swung at Petitioner In a playful act that she did not report until many months later after learning of being impacted by a reduction-in-force and then clearly testifying that it was "petty"?

9. Did the Appeal Court engage in judicial misconduct, abuse its discretion, and deny Petitioner Equal Protection of the law, when considering retirement eligibility when making a decision in Petitioner's case even though the subject was not in issue?

10. Did the Appeal Court and Board abuse their discretion and deny Petitioner. Equal Protection of the Law by stating that matters are in evidence in

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Donald R. Lewis v. Department of Agriculture, Docket Number DA-0752-06-0686-I-1, October 3, 2007, Merit Systems Protection Board, Final Order

Donald R. Lewis v. Department Of Agriculture, Docket Number DA-0751-06-0686-I-1, May 10, 2007, Merit Systems Protection Board, Initial Decision

Donald R. Lewis v. Department of Agriculture, 2008-3031, May 1, 2008, Order of United States Court of Appeals For The Federal Circuit denying Petition For Rehearing

Jurisdiction

The date on which the United States Court of Appeals For the Federal Circuit decided my case was March 7, 2008. Appendix A.

A timely petition for rehearing was denied by the United States Court of Appeals For the Federal Circuit on the following date: May 1, 2008, and a copy of the order denying rehearing appears as Appendix D.

The Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

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Statement of The Case

The Petitioner entered Federal employment in 1971 as a Labor Management Relations Examiner with the National Labor Relations Board. In February 1989, he transferred to the U.S. Department of Agriculture, National Finance Center (NFC), in New Orleans, Louisiana as a GS-12 Supervisory Labor Relations Specialist, up graded to GS-13. In 1997, former NFC Director John Ortego selected Petitioner to design, develop, and manage what later became known as the Equal Employment Opportunity and Workforce Services Staff (EEOWSS), due to a crisis of employment environment issues. See Appendix F.

In the position as manager, Petitioner almost single-handedly changed the employment environment of the Agency from one that had become nationally known for its poor employment environment to one nationally recognized for its model employment environment. He won national awards and recognition for himself and the Respondent, including such awards as the Office of Personnel Management Director's Award and the USDA's Secretary's Award for operating an efficient, effective, and discrimination-free organization. See Appendix F. Petitioner is the only manager of EEO or EEOWSS programs for the Respondent to have won such awards for himself and the programs. He became known as one of the most innovative and achieving EEO managers in the Federal Government, prior to the charges in

the within matter, Petitioner, in his over 36 year employment history with the Federal Government, had never been the subject of any disciplinary action. His performance was always at the Outstanding or Superior levels, with his last performance rating at the Outstanding level. He served 2 years in the U.S. Army by way of the draft during the Vietnam War with an Honorable Discharge and Letter of Appreciation from General William Westmoreland for his war time service. The investigation and charges were instigated and orchestrated by one employee using it to get a promotion (Patricia Bachemin), and another employee (J. Nguyen), and her friends, who wanted the ultimate decision making responsibility to determine who would be included in the reduction-in-force (RIF). In February 2005, Bachemin actually went to the deciding official and sought two things: (1) a promotion, and (2) Petitioner's termination. She received both. The Agency refused to present her at the hearing so that she could be examined by Petitioner. Virginia Gaye Cook, Head of Operations and Agency Misconduct Investigation Coordinator, prepared and sent a promotion position description to Petitioner for promotion of Bachemin that was fraudulent. By regulation and practice, Petitioner should have been the preparer of the position description. Cook became upset when Petitioner refused to sign the fraudulent position description. Bachemin was promoted shortly after Petitioner's proposed removal and administrative leave. The refusal of the Board and Appeal Court to address

the position description and the Seavello issues deprived petitioner of due process, equal protection of the law, and of protection against a prohibited personnel practice. Kushindana, a friend of J. Nguyen, told Petitioner that if he followed through with J. Nguyen being impacted by the RIF instead of M. Nguyen, that he could expect to have problems from her and others in the office. On August 3, 2005, Kushindana told Petitioner that since it appeared that he wasn't going to leave, she was going to have to run him off. See Appendix H. Only 16 days later, August 19, 2005, the Investigator who had been operating in collusion with Kashindana, Bachenin, J Nyagen, and others, told Petitioner at the opening of his initial interview, "You ought to be out of here" and that he should be retired. Given the Investigator's conduct and gross procedural violations, it is Petitioner's position that the Investigator was hired to build a case for his removal.

Cook, arranged for Petitioner to be investigated by a contract investigator with whom she has close ties. The Investigator was instructed to investigate Petitioner for a period spanning over 40 years including years before his employment by the Federal Government. The charges were vague and non-specific as to when and what Petitioner allegedly did and denied his due process rights. When Petitioner could not agree with the conclusory comments under the charges on employees' weight, he was charged with making false statements during an official investigation.

The investigator violated every provision of the procedural guidelines for investigation dated March 24, 2003 which states that "Investigators **should** avoid personal opinions, or conclusions, and **should not** make disciplinary recommendations a part of the report." See Appendix E. The Investigator violated these provisions and thereby denied Petitioner due process and equal protection under the law. This caused substantial prejudice to Petitioner's individual rights by affecting the agency's decision.

The Appeal Court and tribunals below failed to find harmful procedural error even though it is clear that the Respondent violated its own procedural guidelines in the investigation of Petitioner and in the use of the Report of Investigation in reaching the penalty decision to remove Petitioner. The Appeal Court and tribunals below violated Petitioner's Due Process Rights, Fifth Amendment of The U.S. Constitution, and Equal Protection Under The Law in their findings on Petitioner being provided conclusory statements rather than requested needed specifics such as descriptive details of alleged conclusory comments, dates, times, and places of alleged inappropriate comments, and the finding of Petitioner's inability to agree with the vague, conclusory, and non-specific charges as making false statements during an official investigation. They changed the charge on "directing" after the hearing and grossly misdescribed employees on the issue and their relationship with Petitioner. The

Appeal Court and tribunals below upheld Respondents charging Petitioner with unintentional/negligence and then applying the element of intent for the same charges by sustaining the Penalty of Removal on the basis of intent. See Edmound C. Broussard v. Department of Navy, 27 MSPR 382 (1985) (Appendix J), wherein the Agency charged the Appellant with negligence but **improperly** removed him based on the element of intent. The Board and Appeal Court accepted the Respondent's use of conclusroy, boiler plate language on penalty without a balanced and reasoned discussion of all relevant and mitigating factors. The table of penalties was not honestly considered.

When it became clear to Petitioner that the Respondent and this particular group of employees were determined to destroy him, Petitioner sought and received favorable consideration for employment by two other Federal agencies. One Agency offered Petitioner a position and he accepted. However, one day after the agency contacted the Respondent for transfer of Petitioner, the offer was withdrawn. When the other agency contacted Respondent for reference on Petitioner, the agency stopped their process of consideration. It became clear to Petitioner at this point that the Respondent was interested in destroying Petitioner and not just removing him.

On August 29, 2005, Hurricane Katrina made

landfall in New Orleans, Louisiana, and Petitioner evacuated. On February 22, 2006, Petitioner returned to New Orleans and Respondent facility. On March 28, 2006, 34 days after Petitioner's return, Respondent issued Petitioner a proposed removal letter and placed him on administrative leave. Effective September 16, 2006, Petitioner was removed.

On April 18, 2008, during a return call to the Appeal Court on a request to submit copies of case decisions, an Appeal Court personnel began stating/asking Petitioner repeatedly out of the "blue", "you can retire can't you?" This placed Petitioner on notice that the Appeal Court had considered retirement eligibility when making a decision in his case. Petitioner has never raised an issue of retirement eligibility with any tribunal considering his case. See Appendix O.

The Appeal Court states on page 6 of its decision that Byrne's affidavit stated that she learned of the contract employee's conduct from another employee to whom I, J. Nguyen and Kushindana had complained. This is not in Byrnes affidavit, The Appeal Court states on page 8 of their decision that "Mr. Lewis acknowledged that on at least one occasion he picked up one copy of Ms. Nguyen faxes and delivered it to her." There is no evidence in the record that Petitioner ever made such acknowledgement. On page 49 of the Board decision, the AJ states "The record further reflects that M. Nguyen's non-work-related

activities continued into August 2005." Not true and not in the record. M. Nguyen was not in America from July 26, 2005, thru August 26, 2005. She was on administrative leave from August 26, 2005, thru November 14, 2005, due to Hurricane Katrina, The stating that such matters are in evidence in the record is in error, an abuse of discretion, and harmed Petitioner by taking away his property interest in his employment.

REASONS FOR GRANTING THE PETITION

Under 5 U.S.C. 7701(c)(2), the Board is required to overturn the action of the agency, even where the agency has met the evidentiary standard in paragraph (a) of this section, if the appellant:

1. Shows harmful error in the application of the agency's procedures in arriving at its decision;

2. Shows that the decision was based on any prohibited personnel practice described in 5 U.S.C. 2302 (b); or

3. Shows that the decision was not in

accordance with the law.

Harmful error has been defined as error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error.

The agency's action constituted harmful error as defined at 5 CFR 1201.56(c)(3) when it failed to follow the procedures outlined in its procedure issued to "Agency/Mission Area Employee Misconduct Investigation Coordinators" to ensure Department wide standards of quality and consistency in the preparation of employee misconduct investigation reports. See Appendix E. The guidelines provides:

1. Investigators **should avoid personal opinions or conclusions, and should not make disciplinary recommendations a part of the report.**

2. The report should tell a story of what happened, who was involved, when and where it happened and why it happened.

3. **Investigators should refrain from drawing conclusions on the merits of the allegations.** Investigators are exposed to information during the investigation which may not be incorporated in the investigative file, but nevertheless could bias the investigator relative to any analysis of the allegations and could

improperly influence the decision-maker.

4. If someone gives a statement naming another person as having information relevant to the allegations, get a statement from that person. The procedure guidelines exist for the protection of all employees of USDA and to regulate the conduct of "investigators" assigned to investigate misconduct allegations of any employee of USDA. The procedure guidelines do not provide for any employee to be provided less protection than is in the procedure guidelines. Appendix E. To say that Respondent can provide Petitioner and some of its employees less protection than is provided in its procedural guidelines by assigning a contract investigator rather than an employee investigator deprives employees of equal protection under the law and is not in accordance with the principle of fairness for American Citizens.

The investigator provided personal opinions, conclusions, and recommendations, including the recommendation of Petitioner's removal, in her ROI *which was against written USDA procedural* guidelines. Appendix E. The Respondent violated Petitioner's due process rights, deprived him of Equal Protection under the law, and caused substantial prejudice to his individual rights by affecting the agency's decisions.

Without explanation or reason, Petitioner has been subjected to an investigation spanning over 40

years including years before he was employed by the Federal Government. When asked why this was done, Lohfink, the deciding official said he did not know. This took place because the Agency Investigation Coordinator became upset with Petitioner for not signing a fraudulent Position Description, (A prohibited personnel practice and reprisal).

The Merit Systems Protection Board's (MSPB)position that the decision maker did not rely on the Report of Investigation (ROI) is in error, and an abuse of discretion. In the proposed removal dated March 28, 2006, John White, Deputy Director, states:

The Report of Investigation has now been received and I have reviewed its **findings** in detail. The report substantiates serious mismanagement, waste, abuse, and personal misconduct by you **requiring** removal.

In the removal letter dated September 14, 2006, the decision-maker states: After reviewing the proposal letter, the ROI....I have reached the following determinations on each charge.

The decision-maker goes on to state that:

The National Finance Center (NFC) issued a letter dated March 28, 2006, to remove you, Donald Lewis, from your Federal position based on the results of a report of investigation (ROI), Allegations of Misconduct and Mismanagement by Donald

Lewis...conducted by Kathryn T. Vengazo, Consultant for FPMI, Inc.

With the Proposing Official clearly stating that he reviewed the (ROI) **findings** in detail and the **report required the Petitioner's removal** and the decision-maker stating in the decision that he reviewed the proposal letter and the ROI in making his decision, it defies any sense of logic and fairness to say the ROI was not considered in making the decision to remove the Petitioner. The Appeal Court states, "The deciding official did not testify that he did not rely on the report. He merely stated that he did not rely on the investigator's recommendation as to penalty. We therefore find that the Board did not err in rejecting Mr. Lewis' affirmative defense." Appendix A. This defies all principles of credibility, logic, and sound human and legal reasoning. When the deciding
official wrongfully considered the Investigator's findings, personal opinions, conclusions, and other recommendations regarding Petitioner, he considered ingredients that go into the making of penalty determination. The procedural guidelines recognized the harm that would be caused to a person when the procedure guidelines are not followed:

Investigators should refrain from drawing conclusions on the merits of the allegations. Investigators are exposed to information during the investigation which may not be incorporated in the investigation file, but nevertheless **could bias the**

investigator relative to any analysis of the allegations and could improperly influence the decision-maker.

The procedural guidelines cannot "ensure Department wide standard of quality and consistency" if they do not apply to all employees, all Investigators, and carry the force of law. The Respondent ordered the investigation with findings, conclusions, opinions, recommendations, including recommendations on penalty. When some one custom order and pay for a product they fully intend to use what is ordered. The Respondent's procedural guidelines should be analyzed under the standards of a contract. A contract must be construed in accordance with the terms and language used in the agreement. If the terms of the agreement are free of ambiguity and does not conflict with the policy of the law, the contract will be deemed to establish the rights of the parties. Contracts are to be read and understood according to the natural and obvious import of the language used therein. The USDA procedural guidelines does not distinguish between employee investigators and contract investigators. It is for the protection of all employees. To say that the USDA procedural guidelines do not have any legal weight is unconscionable. The document is replete with words such as **shall** and **should** which are defined in the dictionary when used in laws, directives, etc, as an obligation or must. Appendix E.

The Investigator's failure to follow the procedural guidelines permitted the investigator's biases to taint the entire investigation and subsequent report thereby denying the petitioner with a fair and impartial investigation. The agency failed to present Bachemin and Lorri Clark, employees among the group who led the action against Petitioner, for the hearing. Further, the Board and Appeal court failed and refused to consider the prohibited personnel practice of seeking to force Petitioner to sign a fraudulent position description for Bachemin. The Appeal Court states on page 4 of its March 7, 2008, decision that: See Appendix A.

From the finding, the Board concluded that he knew or should have known that he received the overtime payments in violation of the agency procedure. That conclusion, however, does not necessarily follow. Mr. Lewis may have been aware of the proper procedures, yet he may not have known that his timekeeper had not obtained supervisory approval. In any event, the Board found that the agency's charge against him did not require a finding of intent, and it was undisputed that the proper procedure was not followed. We agree with the Board that the charge does not specify an element of intent, and we therefore affirm the Board's determination with respect to that charge.

All of the compensatory time earned was recorded on Petitioner's time and attendance

reports that were reviewed and approved by each of his supervisors from 1994 thru 2005, over 10 years. A review of his T&A's would reveal Petitioner's supervisors should have never expected him to use the compensatory time earned because he was always in a "use or lose" annual leave status. Appendix F. Only after Respondent became upset with petitioner over not signing the fraudulent position description did this become a factor and to be part of the 40 years plus investigation. Petitioner never saw the forms completed for payment of compensatory time by Gaydos, Barnes, and M. Nguyen, timekeepers, and they did not require his approval. Petitioner was not negligent under any described standard of care. He was not aware of who authorized or approved the unused compensatory time each year for payments. All he knew was that he worked the extra hours and earned compensatory time recorded, his T&A's for the years 1994 thru 2005 had been reviewed and approved by his supervisors, and he was paid for compensatory time that was not used within the specified time frame because of his inability to take time off. It is the certifying officer's responsibility to verify that the forms are signed by authorized officials prior to payment. From 1994 thru 2005, over 10 years, his supervisors were aware that he was being paid for the unused time at the end of every year by their review of his T&A's and their budget reports Appendix F. John Ortego, NFC's Director from August 1997 to January 31, 2003, and Petitioner's first-level or second-level

supervisor during this time period, stated that he expected the Petitioner to be paid for the compensatory time earned. Appendix F.

In his response to the proposal notice and during his deposition, Petitioner offered to reimburse the agency for any compensatory payments received by him that they were contending proper management approval had not been obtained by the timekeepers and he did so. During Petitioner's oral response to the charges on April 26, 2006, where in a court reporter made a transcript, the deciding official, speaking of the compensatory time, stated, "No, and look, I know every hour that was on these things was approved by whoever your supervisor was at the time." "Page 134 of the oral response transcript. On page 135 of the transcript, he stated, "Well, I'm not sure it's illegal. It just didn't follow a process or whatever we have."

Notwithstanding the sustaining of the charge as unintentional/negligence, the Appeal Court and MSPB abused their discretion and approved the agency's removal of Petitioner based on the element of intent. See Edmound C. Broussard v. Department of Navy, 27 MSPR 382 (1985), Appendix J, wherein the agency charged the Appellant with negligence but **improperly** removed him based on the element of intent. In the instant case, the Respondent clearly charged petitioner with unintentionally /negligence but clearly used intent in it's penalty.
In regards to the charge of making false

statements during an official investigation, the Appeal Court states on pages 12-13 of the decision that "The Board sustained that charge after finding that Mr. Lewis falsely stated in an affidavit that he never made derogatory remarks about his employees' weight." Appendix A. The Appeal Court, MSPB, and Respondent violated Petitioner's due process rights, Fifth Amendment of the U.S. Constitution, and Equal Protection Under The Law in regards to the finding on this charge. Further, the AJ, Board, and Appeal Court improperly shifted to Petitioner the burden of proving that he did not make false statements during an official investigation. Additionally, the Respondent violated its own procedural guidelines for misconduct investigation which states that "the report should tell a story of what happened, who was involved, when and where it happened and why it happened." Petitioner made a timely request during discovery for detail descriptive specifics, including dates, times, and places of alleged incidents but the Agency said they did not have any. At the hearing the Deciding Official stated that he did not know when the alleged acts occurred; that they could have occurred any time with in the last 5 years or more. Yet he was willing to take away Petitioner's employment after over 36 years without a disciplinary record and near perfect performance history. Without the requested specifics, Petitioner cannot determine if he was at work or present at the place of the alleged incidents or that any such incident in fact occurred. See Mason v. Department of Navy, 70

MSPR 584, 586-89 (1996) Appendix I. The Respondent has not met its burden of a specific incident or pattern of conduct over time and of a preponderance of evidence that Petitioner falsely stated in an affidavit that he never made derogatory remarks about employees weight. Ortego, the former Director from August 1997 to January 2003, stated that Petitioner did not engage in such conduct and that he never received reports of such on Petitioner. Appendix F. Shirley LeBlanc, the agency's star witness stated in her affidavit that Petitioner made reference to "big people." No specifics were provided. Appendix G. Also, LeBlanc stated that she was upset with Petitioner because he had never rated her as Outstanding and because he, as her supervisor, would not get involved in her application for a position in another organization over which Petitioner had no control. Appendix G. Jo Ann Thomas, the employee referenced by Respondent, never stated in any manner that Petitioner ever referred to her as fat ass. Petitioner deserves fair treatment under the laws of the United States as would any citizen. The Board has held that to establish a charge of falsification, the agency must prove, by preponderant evidence, that the appellant: (1) supplied wrong information, (2) knowingly did so with the intention of defrauding, deceiving, or misleading the agency. Heebe v. Department of Justice, 288 F. 3d 1288, 1305 (2002), citing Naekel v. Department of Transportation, 782 F.2d 975, 977-78 (1986). Falsification and fraud cases often turn on proof of the element of intent.

However, a finding that an appellant has provided incorrect information cannot control the question of intent for purposes of adjudicating a falsification charge. Mendez v. Department of Treasury, 88 MSPR 596 (2001). Whether intent has been proven must be resolved by the totality of the circumstances. Blake v. Department of Justice, 81 MSPR 394 (1999). The Board must consider the appellant's plausible explanation as an element of the totality of the circumstances. Nelson v. U.S. Postal Service, 79 MSPR 314 (1998). Failure to provide Petitioner with specifics in which to prepare a response, including to determine whether he was at work and at the location of the alleged incident are part of the plausible explanation. Only the charges and specifications set out in the agency's proposal notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply. La Chance v. Merit Systems Protection Board, 147 F.3d 1367, 1371 (1998); McIntire v. Federal Emergency Management Agency, 55 MSPR 578, 583 n.4 (1992). Nor may the Board substitute what it considers to be a better basis for removal than what was identified by the agency. Shaw v. Department of the Air Force, 80 MSPR 98, 106-07 (1998). Rather, the Board is required to adjudicate an appeal solely on the grounds invoked by the agency and may not substitute what it considers to be a more appropriate charge. Riley v. Department of the Army, 53 MSPR 683, 688 (1992). Appendix M. See

also Gottlieb v. Veterans Administration, 39 MSPR 606, 609 (1989). The Appeal Court overlooked that the failure of the Agency to give the Petitioner adequately detailed notice prior to the hearing of the alleged misconduct prejudices his ability to mount a meaningful defense, denies him due process and violates Respondents own procedural guidelines. The Board and the Appeal Court acknowledges that the Agency could not provide Petitioner with needed specifics such as dates, places, and times. Speaking of the charges that included the specification of derogatory comments on employees' weight, the Appeal Court states:

It was inherent in the nature of the charges in those specifications, however, that great specificity was not possible. Three of the four specifications alleged a pattern of conduct overtime, rather than a particular incident. And the individual instances of inappropriate conduct such as angry remarks, insulting words, were not the types to which witnesses would ordinarily be expected to recall the precise date and surrounding circumstances. See Appendix A. The angry remarks and insulting words were I infact made by Clark. J. Nguyen, and Bachemin. See Appendix K.

Petitioner disagrees that a pattern exists. For a pattern to exist, some specific incidents on specific dates and times would be needed to support such a finding. Teamsters v. United States, 431 U.S. 324

(1977). The agency, as the charging party, bear the burden of showing, by a preponderance of the evidence, that a pattern is the Petitioner's regular and standard operating procedures. Teamsters v. United States, 431 U.S. 324 (1997); EEOC v. Ford Motor Co., 645 F.2d 183 (1981); Presseisen v. Swarthmore College, 442 F. Supp. 593 (1977). A time frame must be provided. The Petitioner cannot knowingly supply wrong information with the intent of deceiving without specifics of dates and times of the alleged incidents. If a pattern existed then that is more reason why specifics should be available to be provided to Petitioner. He did not make false statements during an official investigation.

The allegation of a pattern of conduct over time (charge) was not provided to Petitioner until the March 7, 2008, decision of the Appeal Court. Therefore, required notice was not provided. Without the requested specifics such as dates, times, places, of incidents, Petitioner cannot determine whether he was at work or present at the place of the alleged incidents. The law requires that he be provided sufficient specifics to provide a meaningful opportunity to be heard and to exercise his due process rights. See Barresi v. U.S. Postal Service, 65 MSPR 656 (1994), Goldberg v. Kelly, 397 U.S. 254, 267, 268 (1970), Ragolla v. U.S. Postal Service 983 F.2d 1086 (1992), and Mason v. Department of Navy, supra. Appendix I. The allegation of a "pattern" cannot be used to deny an individual of his due process rights. Petitioner

was not provided the number of alleged unlawful acts, the alleged time period over which the alleged acts occurred, requirements of a pattern. Indeed the deciding official stated that he did not know when the alleged acts occurred; that they could have occurred any time with in the last five years of more. Ortego, the former Director (from August 1997 to January 2003) stated that Petitioner did not engage in such conduct and he never received reports of such on Petitioner. Appendix F. In Jacques E. Lamour and Scott Roseberg v. Department of Justice, 2007 MSPR 185, 2007, the Board pointed out that an adverse action proposal letter needs to be sufficiently detailed to provide an employee proper notice to the charges against him. If an agency fails to do this, it denies the employee a meaningful opportunity to be heard. In that case, the Agency charged the Appellants with assault against an inmate but offered no other details such as when or where it allegedly occurred. In addition to the statutory requirements set out in subchapter 11 of chapter 75, sufficient notice of the basis for an agency's proposed action against a tenured employee also implicates due process requirements guaranteed by the 5th Amendment to the U.S. Constitution. ("No person shall be deprived of life, liberty, or property, without due process of law.") See La Chance v. Erickson, 522 U.S. 262, 266 (1998) See also Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970). In Cheney v. Department of Justice, 479 F.3d 1343, 1353 (2007), the court found that the agency's notice to Cheney that he had "inappropriately queried or

caused to be queried Law Enforcement Databases" was akin to informing Mr. Cheney that his security clearance had been suspended because he had robbed a bank, with out telling him where the bank was and when he had robbed it. It is appropriate to distinguish between a proposal to terminate employment permanently, in which case the requirements of due process may be more comprehensive, and a proposal to suspend an employee temporarily, in which case the requirements of due process are generally less demanding. Gilbert v. Homar, 520 U.S. 924, 930 (1997). Petitioner should be accorded the more comprehensive requirements of due process considering that he was an employee with over 36 years of Federal Service, a draftee of the U.S. Army for Vietnam Wartime service, an unblemished record, with his performance at the highest rating level and that he was facing permanent removal. When the Appeal Court states, "alleged a pattern of conduct over time," for the first time, the questions that the law indicates Petitioner need answers for to prepare a proper defense is what conduct over what period of time with some **specific incidents** on specific dates and times. Teamsters v. United States, 431 U.S. 324 (1997), Hazelwood School District v. United States 433 U.S. 299 (1977). The Agency, as the charging party, bears the burden of showing, by a preponderance of the evidence, that a pattern is the Petitioner's regular and standard operating procedure. Teamsters v. United States, 431 U.S. 324 (1977); EEOC v. Ford Motor Co., 645 F.2d 183 (1981);

Presseinsen v. Swarthmore College, 442 F. Supp. 593 (1977). The burden of a pattern has not been met. The Appeal Court overlooked the fact that Petitioner provided evidence that the burden was not met. Ortego, the Director of the Agency and Petitioner's Supervisor or Manager from October 1997 to January 2003, stated that Petitioner always conducted himself in a professional manner and treated him and others with dignity and respect. He stated that Petitioner did not use vulgar language or tell inappropriate jokes in his presence and never did anyone attribute such behavior to Petitioner. Appendix F. Patricia Duvernay who worked with and for Petitioner since 1989, and whose office was located next to Petitioner, stated, "Petitioner carried himself in a professional manner and did not tell inappropriate jokes about religion or people's weight." Appendix K. Diane Barnes, a retired employee who had worked for Petitioner since about 1991, and whose office was next to Petitioner, stated that she had never heard him use vulgar language or speak inappropriate comments or jokes and that she never heard him call anyone fat ass, bastard, or mother fucker. Hanh Nguyen an employee who worked in a cubicle about 10 feet in front of Petitioner's office, never heard Petitioner use vulgar or profane language, and never heard him use the terms bastard or mother fucker. These overlooked facts supports the finding that a preponderance of evidence does not exist to support a pattern. The Agency did not contest the veracity of their statements. The Appeal Court overlooked facts

and law in regards to the allegation on whether Petitioner's catching J. Nguyen's arm was inappropriate conduct. J. Nguyen stated that Clark, LeBlanc, and Thomas witnessed the incident of Petitioner catching her arm. LeBlanc and Thomas testified that they did not witness the occurrence. The Appeal Court overlooked the fact that Petitioner was passing the area of Kushindana's office door where Kushindana and J. Nguyen were standing. He was on his way to the men's room. J. Nguyen, acting in a playful manner, swung at Petitioner and he caught her arm. He did not squeeze her arm but held it so that she could not swing at him again. J. Nguyen did kick Petitioner with her foot. These all took place in one continuous motion and transaction. Petitioner continued on his path to the men's room. Petitioner did not perceive J. Nguyen's actions to be in anger but rather a playful act. J. Nguyen has motioned at Petitioner with her fist many times, but none that he perceived in anger. The Appeal Court overlooked the fact that J. Nguyen did not report this until many months had passed and she learned of the impact by the RIF. Petitioner should not be removed for a playful, "petty" act initiated by J. Nguyen. J. Nguyen clearly testified that the act was "Petty." The Appeal Court states on page 9 of its decision that (Appendix A):

"We find, however, that it was reasonable for the Board to infer that when Mr. Lewis asked his subordinate employees to perform personal work for him, the request was equivalent to an order

based on the relationship between Mr. Lewis and the employees."

This finding cannot be reasonable when it is untrue. The Court of Appeals and the MSPB abused their discretion, violated Petitioner's due process rights, and deprived him of Equal Protection of the Law by substituting new charges for Respondent after the hearing. The Appeal and Board is required to adjudicate an appeal solely on the grounds invoked by the agency and may not substitute what it considers to be a more appropriate charge. Riley v. Department of the Army, 53 MSPR 683, 688 (1992); Gottlieb v. Veterans Administration, 39 MSPR 606, 609 (1989). Appendix M. Petitioner was specifically charged with "directing" subordinate employees to perform personal work. Not one employee testified or provided a statement that the employee was directed by Petitioner to perform work. The relationship of Petitioner with the employees is set forth in their statements as follows:

Hanh Nguyen (July 11, 2006 Affidavit)

"Donald R. Lewis, Chief of EEOWSS, was my supervisor during my employment in EEOWSS. My workstation was located in a cubicle about ten feet from the door of Mr. Lewis' office. Mr. Lewis was very supportive of me and the other students in EEOWSS in our efforts to work and go to college. He always worked with me in arranging my work schedule and class exam schedule so that I could

accomplish both objectives. I enjoyed working for Mr. Lewis and found him to have a sense of humor that made the work environment a comfortable place to work. Mr. Lewis has never directed or forced me to perform personal work for him. I have never felt intimidated by Mr. Lewis. Anything that I did for Mr. Lewis was done during my break time.

Thanh-Thuy Nguyen (Affidavit July 5, 2006) "Donald R. Lewis, Chief, Equal Employment Opportunity and Workforce Services Staff, has never directed or forced me to type or perform personal work for him." I never performed any typing for Mr. Lewis against my will. On some occasions, I actually asked Mr. Lewis if he had any typing that I could perform for him. I never felt that I had to type anything for Mr. Lewis. Some of the typing was done on what could be considered my break time. Almost all of the typing was short in length. Further, it was not frequent that I typed something personal for Mr. Lewis. As stated in my affidavit on December 24, 2005, Mr. Lewis was an enjoyable manager to work with. I have been asked if I have looked anyone in the eye and said that I hate Mr. Lewis. I do not hate Mr. Lewis and I have never told anyone that I hate Mr. Lewis. Mr. Lewis was very supportive of me as a student so why could I hate him?

Thuy Thu Nguyen testified during the hearing (December 12, 2006) that she gave appellant a card in which she wrote, "Mr. Lewis, it was nice of you! I hate to admit this, but you have been so

nice and kind in mentoring me throughout the time in reaching my professional goals." She testified that Petitioner asked her to type something for him.

The law clearly provides that it is the specific charge that is controlling. The Respondent specifically charged Petitioner with "directing." The charge should be decided based on the specific charge and the preponderance of the evidence. See: Nazelrod v. Department of Justice, 54 MSRP 461 (1992); King v. Nazelrod, 43 F.3d 663 (1994); Nor may the tribunal substitute what it considers to be a better basis for removal than what was identified by the agency. Shaw v. Department of Air Force, 80 MSPR 98, 106-07 (1998); Riley, supra; Gottlieb supra.

In regards to credibility, the Appeal Court should not uphold the MSPB if there is a lack of sufficient or appropriate findings to sustain the result reached by the Board. In Goldstein v. Department of Treasury, 51 F.3d 1570, 1576 (1995) the court stated:

> Per its own precedent in Hillen v. Department of Army, 35 MSPR 453 (1987), the Board must ensure that the AJ has made appropriate credibility judgments detailing where and why she credited certain testimony over other testimony and resolving or reconciling all material conflicts in the record. Where the AJ has not, the Board must fill in the gaps, remanding for further evidentiary hearing, if

necessary. Although we review credibility and other factual determinations under an extremely deferential standard, where, as here, the Board and/or the AJ have failed to make necessary findings, we will not "rubber stamp" the decision because of a deferential standard of review.

The Petitioner asserts that the Board's credibility determinations were abbreviated, based on improper considerations, unsupported by the record, and failed to meet the requirements in Hillen v. Department of Army, 35 MSPR 453 (1987), Garza v. Department of Army, 57 MSPR 214 (1993). The Appeal Court does not owe deference to the Board's AJ's credibility determination where the findings are incomplete, inconsistent with the weight of evidence, and do not reflect the record as a whole. The Board's AJ makes the conclusory credibility finding on page 10 of the Board's decision stating, "Furthermore, I found the appellant's general demeanor while testifying, i.e., his carriage, behavior, manner, and appearance demonstrated a lack of candor." The AJ did not describe Petitioner's carriage behavior, manner, and appearance. See Appendix C. The AJ did not describe Petitioner's carriage, behavior, manner, and appearance. The Board's AJ also states that the Petitioner's behavior reflects a significant lack of honesty and integrity because he intended to submit a research paper that the Petitioner conceded was written by one of his students for his son's admission to a Ph.D. program. The AJ's finding

is arbitrary, capricious, abuse of discretion, and not supported by substantial evidence. Petitioner testified that the student wrote some of the paper that he wrote some of the paper. Petitioner told the truth. In Special Counsel v. Eubanks, 76 MSPR 405, 416 (1997), the Board stated that it is error for a fact finder to rely on a witness's demeanor to find that her testimony is untrue without explaining anything about her manner and appearance that warranted that conclusion. Petitioner's carriage, behavior, manner, and appearance should have been described. The AJ, Board, and Appeal Court went on to use the erroneous general credibility finding to make other credibility findings against Petitioner and to sustain each charge. Further, it should be noted that the AJ's description for Petitioner's demeanor comes directly out of Peter Broida's "A Guide to Merit Systems Protection Board Law and Practice" page 865, which states, "Demeanor constitutes the carriage, behavior, manner, and appearance of a witness during testimony." The elements are the same and in the same order. The Board should not provide deference generally reserved for a judge's credibility finding if those findings suffer from paucity of explanation. See Garza v. Department of Army, 57 MSPR 214 (1993).

The Appeal Court overlooked the law and facts on the impact of the conduct of those who acted in bad faith and with malice and engaged in collusion among themselves and with the Investigator to harm and destroy Petitioner. The

Appeal Court stated on page 3 of it's decision that it would address these issues under Seavello v. Department of Navy, 4 MSPB 239, 241(1980) but it did not. Bachemin spoke with the Investigator and the other employees acting with malice and in collusion against Petitioner. Appendix N. The Investigator went on to make findings, conclusions, opinions, and recommendations against Petitioner, including the recommendation of his removal. The fabrications by Bachemin against Petitioner because her promotion position description was in issue and her influencing others against Petitioner was not cured by the AJ stating that the Board was not using her statement. The vine had already been poisoned. The Misconduct Investigator Coordinator, became upset with Petitioner when he would not sign the fraudulent position description for Bachemin. She ordered the investigation of Petitioner for a period of over 40 years, a time period exceeding his Federal employment, and with requirements of personal opinions, conclusions, and recommendations, including the recommendation of Petitioner's removal, all violations of the Agency's procedural guidelines. Appendix E. A prohibited personnel practice was committed against petitioner. Kushindana threatened to cause problems for Petitioner if J. Nguyen was impacted by the RIF rather than M. Nguyen and on August 3, 2005, threatened to run Petitioner off since it did not appear he was going to leave. Appendix H. The Board and Appeal Court overlooked the law in Seavello v. Department of Navy, supra, wherein

charges based upon conduct that occurred two years prior were brought to the agency's attention in an untimely fashion by an employee who knew of the conduct all along but choose to alert the agency to it for personal reasons. The charges were dismissed because there were serious issues of credibility and because the Board found the case against the appellant "irrevocably tainted by personal animus." Appendix A and C. The Board and Appeal Court ignored the Psychological Stress Evaluator (Voice Lie Detector) tests of Petitioner taken on April 8 and 13, 2006, without explanation or reason, that included the threats made to harm him. Appendix H. When the Board and Appeal Court ignored this evidence of Petitioner, they harmed him, including the denial of his right to fully present his position and abridged his rights under the U.S. Constitution. It denied Petitioner Equal Protection under the law and the U.S. Constitution. Petitioner pointed out to the Agency, AJ, Board, and Appeal Court that the Agency knew that Kushindana was not being honest when she said Petitioner had spoken to her when he was upset about not getting a promotion to a GS-15 that he applied for but was not selected by the Agency and she asked him if he had thoughts about retiring. This never took place; he **never** applied for a GS-15 at the Agency to be upset about not being selected. The agency did not have any records they could produce on Petitioner applying for a GS-15. It is inherently improbable that a person would be expressing disappointment over not being selected for a GS-15 at an organization

when he never applied for a GS-15 there. In an effort to harm Petitioner, Kushindana went on to testify that only Petitioner knew about her conducting private business on Government time and equipment. Kushindana alleged that Petitioner would not take appropriate management action against a contract employee on allegation of sexual harassment. However, when Petitioner reassigned a counseling case after Kushindana belatedly told him about comments made to her by Gary Dukes, she filed a complaint against Petitioner. Again, as to Kashindana performing personal work, it is inherently improbable Petitioner knew because he worked in a differen suite o office from Kashindana.

The Appeal Court is in error on the law and facts on the charge of failure to take appropriate management action. On page 6 of the decision, the Appeal Court found (Appendix A):

> Ms. Byrne's affidavit stated that she learned of the contract employee's conduct from another employee who Ms. Nguyen and Ms. Kushindana had complained. Based on Ms. Byrne's affidavit, we find that the Board's conclusion that Mr. Lewis knew of the contract employee's conduct before February 17 to be supported by substantial evidence. We therefore affirm the Board's holding with respect to the second charge.

Byrne's affidavit was provided to the Appeal Court

by Respondent, pages 142-143 of their Appendix. A careful reading of Byrne's affidavit will support a finding that the findings are not supported by facts. She has never stated that "another employee" told her of Kushindana or that Kushindana communicated any allegation of sexual harassment to her. Petitioner's communication with Byrne on the morning of February 17, 2005, that included reporting J. Nguyen's and Kushindana's position on the contract employee rather than just Nguyen's is the
only evidence of Kushindan's position being conveyed to Byrne. See also Appendix K. The Appeal Court stated something as fact that is not in the record. Petitioner asked the Appeal Court to review Byrne's affidavit in the face of the factual error but they did not. Prior to February 17, 2005, Petitioner had asked Nguyen if there were any issues with the contract employee and she told him no. Nguyen come to Petitioner once and asked Petitioner why he did not get his haircut like the contract employee. At that time Petitioner did not know the identity of the contract employee. There was no issue of sexual harassment with the contract employee presented to Petitioner until the morning of September 17, 2005. When Byrne called on February 17, 2005, she clearly stated that she was returning Petitioner's call on Nguyen, Kushindana, and the contract employee. See Appendix K.

The employment history of the employee and the Investigator's conduct should be considered in an

analysis of the penalty in this case. The Agency Misconduct Investigator Coordinator, ordered an investigation of Petitioner for a period of over 40 years without boundaries as to issues and USDA procedural violations. Given the investigators conduct, including that of telling Petitioner upon the opening of his interview that he should be gone, and the gross procedural violations it is Petitioner's position that the investigator was hired to build a case for his removal. She was upset with Petitioner for not signing a fraudulent position description for Bachemin, a prohibited personnel practice. Bachemin, along with other employees who were upset with Petitioner over J. Nguyen being impacted by the RIF rather than M. Nguyen, orchestrated and encouraged the employees against Petitioner. Cook ordered the investigation in total violation of the procedures set forth in the USDA procedure guidelines for misconduct investigations, with the procedure guidelines stating that failure to follow them could improperly influence the decision-maker. Appendix E. Petitioner, at the time of the investigation, had over 36 years of Federal service with an unblemished disciplinary record, a near perfect performance history record at the highest level with his last rating being at the highest level, and having served 2 years in the U.S. Army by way of the draft during the Vietnam War with an Honorable Discharge and Letter of Appreciation from General William Westmoreland for his war time service. He won national awards for himself and the Agency. No other EEO Manager carried the office and

programs to the level of achievement of Petitioner. See Appendix F. No individual or tribunal has set forth any analysis of their rational on finding Petitioner not fit for employment after over 36 years of basically perfect employment record as to performance and conduct. When it became clear to Petitioner that Respondent and the particular group of employees were determine to destroy him, Petitioner sought and received favorable consideration for employment by 2 other Federal agencies. One agency offered Petitioner a position and he accepted. However, one day after the agency contacted Respondent, the offer was withdrawn. When the other agency contacted Respondent for a reference on Petitioner, the agency stopped their process of consideration. Respondent's desire to prevent Petitioner from going on else where with his life and to hold him within their grip so that they could not just remove him but rather destroy him has to be considered when considering the reasonableness of the penalty and motive. Respondent has never set forth any position on why they harmed Petitioner in his efforts to leave and go on with his life. When the deciding official was asked why Petitioner was investigated for over 40 years he answered that he did not know.

Upon the Investigator, initial contact with Petitioner, she told him that, "you ought to be out of here," and that he should be retired before having his position on any issue. Petitioner's rating was at the Outstanding level, the highest rating possible. The

Investigator presented her (ROI) preliminary findings to the deciding official on January 3, 2006. She did not have Petitioner's affidavit until after January 19, 2006.

In reviewing the penalty determination, the Appeal Court overlooked points of law and facts. In doing so, the Appeal Court, MSPB, and Respondent violated Petitioner's Rights of Equal Protection Under the Law, Due Process Rights, and Fifth Amendment of the U.S. Constitution by taking away his protected property interest in his employment by the Respondent charging him with unintentional/negligence and the MSPB and Appeal Court sustaining the Respondent's findings on the same basis and Respondent removing Petitioner by applying the element of intent for the same charges and the Appeal Court and MSPB abusing their discretion by sustaining the Penalty of removal by Respondent on the basis of intent. See Edmound C. Broussard v. Department of Navy, 27 MSPR 382 (1985), (Appendix J) wherein the Agency charged the Appellant with negligence but **improperly removed** him based on the element of intent. The Board and Appeal Court acknowledge that Respondent never charged or proved the element of intent against Petitioner yet they approved his removal on that basis.

An employee with no prior disciplinary record, good prior performance and job dedication possesses good potential for rehabilitation. Petitioner presented these and more. His

performance was almost always at the highest level and his dedication to the job is supported by the many awards won for the Agency, over 25 personal awards, the developing of the office to the highest level of achievement ever, and over 36 years of Federal Service with no disciplinary record. See Appendix F. Petitioner's personal development was gained against the odds. He was restricted by state action to attending a condemned school. He never had a text book that had not expired until he graduated from high school and made personal purchases. All of his education was gained while working.

The Board and the Appeal Court have refused to address the issue of prohibited personnel practice of Petitioner refusal to sign the fraudulent position description on Bachemin. Kushindana threatened Petitioner including to run him off. See Appendix H. Bachemin went to the deciding official and sought a promotion and Petitioner's removal. She got both. Petitioner was administered 2 psychological stress evaluator (voice lie detector) tests that included the threats with the result being that he was being truthful. Appendix H. The AJ, Board, and Appeal Court ignored the test results and never addressed them. When the Appeal Court ignored the tests results it harmed Petitioner, including the denial of his rights to fully present his position and abridged his rights under the U.S. Constitution. The deciding official relied upon information in charges that he stated he did not know when the alleged misconduct suppose to have occurred, that it

could have occurred five years ago or more. Respondent violated its own procedural guidelines on investigations which states that "the report should tell a story of what happened, who was involved, when and where it happened and why it happened." Yet he was willing to take away everything that Petitioner had worked for as to employment. The Board and appeal Court did not properly review the agency's penalty selection to assure that the Agency conscientiously and properly considered the relevant factors in choosing the penalty and striking a reasonable and responsible balance within tolerable limits of reasonableness. See also the table of penalties in Appendix L. For arbitrary, invidious, and capricious reasons the Appeal Court engaged in judicial misconduct that was wrong and harmed Petitioner as a citizen seeking a just and fair review of the issues in his case. The Appeal Court wrongfully considered Petitioner's eligibility for retirement. Due to word limitation, Petitioner respectfully request that the Supreme Court read Appendix O for more information on this judicial misconduct issue. Petitioner never received a response or answer.

Conclusion

This petition for a writ of certiorari should be granted. The Appeal Court and Board have decided important questions of federal law in away that conflicts with relevant decisions of this Court and failed to consider important questions of federal law such as prohibited personal practices

and reprisal for failure to engage in such. The Appeal Court has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power, to include that of judicial misconduct and the consideration of Petitioners eligibility for retirement in reaching its decision when such was not in issue.

Respectfully Submitted,

Donald R. Lewis

Donald R. Lewis
Pro Se
Date: 7/25/08

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(2)

Supreme Court, U.S.
FILED

No. 08128

JUL 25 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

In The Supreme Court of The United States

Donald R. Lewis,
Petitioner

v.

Department of Agriculture,
Respondent

On Petition for a Writ of Certiorari to United States Court of Appeals for the Federal Circuit

Petition for Writ of Certiorari

Appendix

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NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

2008-3031

Donald R. Lewis,

Petitioner,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.
Petition for review of the Merit Systems Protection Board in DA0752060686-I-1.

DECIDED: March 7, 2008

Before BRYSON, Circuit Judge, CLEVENGER, Senior Circuit Judge, and DYK, Circuit Judge.

PER CURIAM.

After the Department of Agriculture removed appellant Donald R. Lewis from his position, Mr. Lewis appealed the agency's

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Note: This disposition in nonprecedential

United States Court of Appeals for the Federal Circuit

2008-3031

DONALD R. LEWIS,

Petitioner,

v.

DEPARTMENT OF AGRICULTURE
Respondent.

Donald R. Lewis, of Kirbyville, Texas, pro se.

Anuj Vohra, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, for respondent, With him on the brief were Jeanne E. Davidson, Director, and Donald E. Kinner, Assistant Director.

Appealed from: Merit Systems Protection Board

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decision to the Merit Systems Protection Board. The Board sustained each of the six charges against him and upheld his removal. We affirm.

I.

Mr. Lewis was employed by the National Finance Center ("NFC") of the Department of Agriculture as the program manager for the agency's Equal Employment Opportunity and Workforce Services Staff. His duties encompassed a number of matters related to the resolution of discrimination complaints. On March 28, 2006, the agency sent Mr. Lewis a notice of proposed removal in which it listed seven charges against him: (1) receipt of government funds without securing required management approval; (2) failure to take appropriate management action; (3) allowing subordinate employees to conduct private business for personal gain using government time and equipment; (4) directing subordinate employees to perform personal work or errand for him on government time and equipment; (5) taking retaliatory action against subordinate employees following their making protected disclosures during and official investigation; (6) inappropriate management and personal conduct; and (7) making false statements during an official investigation.

After Mr. Lewis responded to the notice, the NFC Director removed Mr. Lewis from his position, sustaining all of the charges except the retaliatory action charge. Mr. Lewis appealed his removal to the Merit Systems Protection Board, challenging

both the findings of misconduct and the penalty. He also raised an affirmative defense based on alleged deficiencies in the agency's investigation of his misconduct. The Board sustained the charges and the penalty, and it rejected Mr. Lewis's affirmative defense. In his petition for review, Mr. Lewis asserts that the Board erred in (1) affirming the charges against him, (2) finding that he had not established an affirmative defense based on harmful error in the application of the agency's procedures, and (3) finding that his removal was a penalty in the range of reasonableness

II

As an initial matter, Mr. Lewis asks us to reverse the Board's decision based on what he sees as a concerted effort among a number of NFC employees to effect his removal. Mr. Lewis asserts that the investigation into his alleged misconduct was initiated and orchestrated by an employee who hoped to get a promotion and another employee whose position was eliminated because of a reduction in force in July 2005. Mr. Lewis argues that the Board failed to follow its decision in Seavello v. Department of Navy, 4 M.S.P.B. 239, 241 (1980), a case in which the Board reversed an agency's demotion of an employee after finding "the case against the appellant irrevocably tainted by personal animus and testimony lacking in credibility." We will address Mr. Lewis's concerns related to bias against him as

those concerns affect the Board's conclusion with respect to each charge. As Mr. Lewis challenges the Board's decision on each of the charges against him, we address each charge in turn.

A.

In its first charge, the agency alleged that Mr. Lewis received government funds without management approval. That allegation was based on agency records showing that Mr. Lewis received lump-sum payments for unused compensatory time without obtaining supervisory approval. The agency's policy regarding compensatory time requires all compensatory time to be liquidated by the end of the leave year. Employees who do not use their compensatory time by that deadline forfeit their right to use their compensatory time and to receive overtime pay, unless an employee can establish that he or she was unable to use compensatory time "due to an exigency of the service beyond the employee's control." For employees to receive overtime pay for unused time, they must obtain supervisory approval, which requires timekeepers to submit a specific form to the human resources staff before the deadline (i.e., the end of the leave year). Mr. Lewis received seven payments for compensatory time, and the agency had no record that the proper form for supervisory approval was submitted.

Mr. Lewis testified that he was unaware that the timekeeper who processed his payments did not follow the proper procedure and that he was unaware that supervisory approval had not been obtained. Based on M. Lewis's supervisory position, the Board found that Mr. Lewis should have been aware of the proper procedures for receiving payment for unused compensatory time. From that finding, the Board concluded that he knew or should have known that he received his overtime payments in violation of agency procedure. That conclusion, however, does not necessarily follow. Mr. Lewis may have been aware of the proper procedures, yet he may not have known that his timekeeper had not obtained supervisory approval. In any event, the Board found that the agency's charge against him did not require a finding of intent, and it was undisputed that the proper procedure was not followed. We agree with the Board that the charge does not specify an element of intent, and we therefore affirm the Board's determination with respect to that charge.

B

The agency's second charge was based on Mr. Lewis's failure to take appropriate management action when two of his subordinate employees complained of sexual harassment by a contract employee. The agency's first specification in support of that charge stated that Ms. Adimu Kushindana complained to Mr. Lewis several times about the contract employee's

behavior, only to have Mr. Lewis laugh in response. The second specification stated that Ms. Julie Nguyen first began having problems with the contract employee on February 9, 2005. The notice specified that Ms. Nguyen complained to Mr., Lewis but that Mr. Lewis responded by either laughing or ignoring her.

Before the administrative judge, both Ms. Nguyen and Ms. Kushindana testified that they approached Mr. Lewis about the contract employee's conduct on February 9, but that Mr. Lewis did not take any action until February 17. Mr. Lewis, however, testified that the first time he learned of the contract employee's conduct was on February 17, and he stated that he contacted the contract employee's supervisor, Ms. Debra Byrne, that same day. The administrative judge, however found Mr. Lewis's testimony to lack credibility and concluded that Mr. Lewis likely learned of the contract employee's conduct earlier than February 17. The administrative judge did not find that Mr. Lewis had laughed about the allegations of the of the contract employee's conduct, but did find that having learned of the allegations proper to February 17, Mr. Lewis should have taken some action prior to that date an failed to do so.

On appeal, Mr. Lewis challenges the administrative judge's credibility determination. He argues that the administrative judge failed to explain why she chose not to credit Mr. Lewis's testimony, but instead only stated that his "general demeanor while testifying, i.e., his carriage,

behavior, manner, and appearance, demonstrated a lack of candor." Mr. Lewis also asserts that several of the employees who testified against him on this charge were upset about a July 2005 reduction in force in the agency. Ms. Nguyen was the employee whose position was eliminated, and Mr. Lewis asserts that several of her former co-workers, including Ms. Kushindana, were upset about Mr. Lewis's decision to eliminate her position.

The administrative judge acknowledged that the reduction in force "may very well have caused some witnesses to now have a bias against the appellant." In light of that possibility, the administrative judge explained that she relied "to a large extent" on the testimony and affidavit of Ms. Byrne in sustaining this charge. Ms Byrne's affidavit stated that she learned of the contract employee's conduct from another employee to whom Ms. Nguyen and Ms. Kushindana had complained. According to Ms. Byrne, that employee stated that Ms. Nguyen "had been trying to handle [the situation] internally with her supervisor but that the situation was persisting." Ms. Byrne's affidavit also stated that, when she contacted Mr. Lewis, she "was told that Ms. Nguyen had complained to him about the situation but he ha not taken her complaint seriously." Based on Ms. Byrne's affidavit, we find the Board's conclusion that Mr. Lewis knew of the contract employee's conduct before February 17 to be supported by substantial evidence. We therefore affirm the Board's holding with respect to the second charge.

C

The agency's third charge was "Allowing Subordinate Employees to Conduct Private Business for Personal Gain on Government Equipment and Time." The agency based that charge on the activities of two of Mr. Lewis's employees. The first employee, Ms. Myloc Nguyen, used NFC equipment during government time for a restaurant, convenience store, and other businesses that she operated. The second employee, Ms. Kushindana, performed work as a travel agent during work hours. The administrative judge found that Mr. Lewis knew of the activities of Ms. Kushindana. As for Ms. Nguyen, the administrative judge found that Mr. Lewis had sufficient knowledge of possible wrongdoing on her part that he should have taken action and failed to do so.

With respect to Ms. Kushindana's activities, it was undisputed that Ms. Kushindana performed work as a travel agent on government time. Ms Kushindana testified that Mr. Lewis asked her for information on a trip to Disney World during work and that she provided him with rates. In his testimony, Mr. Lewis did not directly refute that assertion, but rather stated that Ms. Kushindana never planned a trip for him. The administrative judge explicitly credited Ms. Kushindana;s testimony over Mr. Lewis's testimony.

Mr. Lewis again contends that Ms. Kushindana testified against him out of personal

animus. Mr. Lewis's claim of bias was before the administrative judge, however, and the administrative judge was entitled to weigh the evidence in light of that, asserted bias.

With respect to Ms. Nguyen's activities, Mr. Lewis argues that the Board's finding that he failed to take appropriate action to curtail her business-related actives in the office is erroneous. Specifically, Mr. Lewis points to an affidavit from Ms. Nguyen stating that she made effort to conceal her business-related activities from Mr. Lewis and others close to him. Mr. Lewis also asserts that after he learned of Ms. Nguyen's activities from his discussion with Ms. Kushindana, which he states took place in June or July 2005, he began monitoring Ms. Nguyen more closely. He contends that the Board erred in finding that Ms. Nguyen's activities continued through August 2005 because she went on a 30-day vacation and did not return until November 2005 on account of Hurricane Katrina. Mr. Lewis states that when she returned, he moved her office closer to his so that he could observe her more closely and that he also establishes a time to track how official time was used.

Although Mr. Lewis asserts that he took action after ms. Kushindana brought Ms. Nguyen's activities to his attention, the administrative judge found that he was likely on notice of possible wrongdoing by Ms. Nguyen from an earlier date. The administrative judge found it to be improbable that Mr. Lewis was unaware of Ms. Nguyen's activities, as it was common knowledge that Ms.

Nguyen performed work for her businesses at the NFC office on government time. Mr. Lewis's reliance on Ms. Nguyen's affidavit does not persuade us that the administrative judge erred, because the record shows that her activities were well known throughout the office. Several employees testified that documents relating to Ms. Nguyen's personal businesses were found in the office fax machine, and Mr. Lewis acknowledged that on at least one occasion he picked up one of Ms. Nguyen's faxes and delivered it to her. Because the administrative judge was entitled to credit the agency's evidence over Mr. Lewis's, we affirm the Board's ruling with respect to the third charge.

D

Mr. Lewis next challenges the Board's determination with respect to the fourth charge, that he directed his subordinate employees to perform personal work for him on government time and equipment. The specification that was sustained by the deciding official alleged that Mr. Lewis directed a number of employees to prepare various personal documents such as personal letters, letters to banks, and bills of sale for real estate. Mr. Lewis was also charged with directing a student employee to write a research paper for Mr. Lewis's son.

In sustaining the fourth charge, the administrative judge found unconvincing Mr. Lewis's assertion that he merely asked his

employees to perform his personal work for him but that he never directed them to do so, and his contention that none of his employees ever objected to performing the work. The administrative judge also found that because of Mr. Lewis's supervisory position, the student employees that he directed to perform his personal work, including the student employee who wrote a research paper for his son, would have been highly unlikely to object to his requests.

Mr. Lewis argues that the Board erred in finding that he directed employees to perform his personal work. He states that none of the employees who testified or provided statements stated that they were actually ordered to perform personal work for Mr. Lewis. We find, however, that it was reasonable for the Board to infer that when Mr. Lewis asked his subordinate employees to perform personal work for him, the request was equivalent to an order based on the relationship between Mr. Lewis and the employees. The Board's fining on the fourth charge was therefore supported by substantial evidence.

E

The Board next addressed the charge in the notice of proposed removal that alleged that Mr. Lewis engaged in inappropriate management and personal conduct. That charge was supported by four specifications, all of which were sustained by the Board. The specifications alleged that Mr. Lewis (1) made inappropriate comments

to his subordinates regarding religion, sexual orientation, and employees' weight, (2) pounded his fist loudly on his desk and on other employees' desks, (3) harshly criticized employees, causing them to cry, and (4) on January 15, 2005, grabbed Julie Nguyen's arm so hard that it left a bruise.

Relying on the Board's decision in Mason v. Department of Navy. 70 M.S.P.R. 584, 586-89 (1996), Mr. Lewis argues that the first three allegations were too vague to provide proper notice to him because they did not specify the dates or locations of the alleged conduct. In Mason, the Board reversed an agency action based on an employee's alleged use of racial slurs because the agency's proposed notice of removal "did not give any indication of when or where this misconduct allegedly occurred." Id. At 587. In this case, Mr. Lewis submitted an interrogatory requesting specific details with respect to the alleged offensive comments and conduct, but the agency provided none.

Mr. Lewis contends that because of the lack of specificity in the first three specifications, he was denied a fair opportunity to respond to those charges. It was inherent in the nature of the charges in those specifications, however, that great specificity was not possible. Three of the four specifications alleged a pattern of conduct over time, rather than a particular incident. And the individual instances of inappropriate conduct, such as angry remarks or insulting words, were not the type as to which witnesses would ordinarily be expected to recall the precise date and

surrounding circumstances. Nonetheless, while the agency was not able to provide the particular date and location for each incident of allegedly inappropriate conduct, the agency provided, with regard to each specification, the names of those employees who had complained about Mr. Lewis's conduct and the particular nature of his conduct. Moreover, a number of the witnesses prepared affidavits containing details regarding Mr. Lewis's inappropriate conduct, and he had copies of those affidavits prior to the hearing before the agency and before the administrative judge. Under these circumstances, we are satisfied that the agency's failure to provide additional details about the alleged misconduct did not constitute an unfair failure to provide discovery.

With respect to the first specification, the Board sustained the charge that on multiple occasions Mr. Lewis had used inappropriate language and made offensive comments in front of subordinates. While Mr. Lewis challenges this finding and at the hearing denied making such comments, the administrative judge made a credibility determination with respect to the conflicting evidence on this point, and such credibility determinations are virtually unreviewable. See Chambers v. Dep't of the Interior, No. 2007-3050, slip op. At 111 (Fed. Cir. Fed. 14, 2008). Accordingly, we conclude that the Board's decision sustaining the first specification was supported by substantial evidence.

With respect to the fourth specification, the Board sustained a charge relating to a specific

instance of misconduct. The agency alleged that on January 15, 2005, Mr. Leis grabbed Ms. Julie Nguyen's arm and squeezed it to the point of causing bruising. According to the agency, Mr. Lewis did not let go until Ms Nguyen kicked him. Mr. Lewis characterized the incident differently, testifying that he caught Ms. Nguyen's arm in his hand because she was motioning with her arms without realizing that he was walking by. He explained that Ms. Nguyen then kicked him while he was walking away. The administrative judge, however, rejected Mr. Lewis's explanation, finding it implausible that he would simply walk away and do nothing after being gratuitously kicked by one of his employees.

Mr. Lewis argues that the incident with Ms. Nguyen should be disregarded because Ms. Nguyen characterized the incident as "petty" in explaining why she did not report it at an earlier date. Even if Ms. Nguyen thought the incident to be "petty" at the time, however, the agency was entitled to consider it to be a serious matter that raised concerns about Mr. Lewis's ability to mange employees. Notwithstanding Mr. Lewis's argument that Ms. Nguyen was biased against him because Mr. Lewis eliminated her position, the administrative judge's reason for doubting Mr. Lewis's testimony provides a sufficient basis for crediting Ms. Nguyen's testimony, and we therefore affirm the Board's determination that the agency met its burden of proof. Because we affirm the Board's determination with respect to two of the factual specifications, we affirm the Board's decision to

sustain the overall charge. See Burroughs, 918 F.2d at 172. Accordingly, we need not reach the other two specifications under charge seven, which are less clearly sustainable.

F

The last charge that the Board sustained against Mr. Lewis was that Mr. Lewis made false statements during an official investigation. The Board sustained that charge after finding that Mr. Lewis falsely stated in an affidavit that he never made derogatory remarks about his employees' weight. The Board made a factual determination that Mr. Lewis made such statements in connection with the charge regarding Mr. Lewis's alleged inappropriate personal and managerial conduct. The Board therefore found that Mr. Lewis's statement in his affidavit was made knowingly with the intention of misleading the agency. Because we have upheld the Board's findings with respect to Mr. Lewis's remarks to subordinate employees, we sustain the administrative judge's finding that his denial of making those remarks was false.

III

Mr. Lewis argues that the Board erred in rejecting his affirmative defense based on "harmful error in the application of the agency's procedures in arriving at" its decision. See 5 U.S.C. 7701(c)(2)(A). Mr. Lewis asserts that the agency's

investigation into his alleged misconduct did not follow the guidelines established in an agency memorandum that was circulated in March 2003. That memorandum specified that investigators should avoid including personal opinions or conclusions in their reports, and should refrain from making disciplinary recommendations. The agency hired an outside contractor to investigate Mr. Lewis's misconduct, and the report that she prepared for the agency contained her personal opinions, conclusions, and recommendation for disciplinary action.

The Board rejected Mr. Lewis's argument for tow reasons. First, it found that the March 2003 memorandum was not intended to have the effect of a law, rule, regulation, or other official policy. Rather, it was intended to provide guidance for agency investigators. The Board further found that the official policy of the Department of Agriculture with respect to investigations of employee misconduct, as described in the pertinent agency manual, did not prohibit investigators from including their opinions, conclusions, or recommendations. Moreover, the manager who wrote the March 2003 memorandum testified that he did not intend the memorandum to apply to outside investigators.

Second, the deciding official testified that he gave no consideration to the investigator's summary, which was the only portion of the report that contained the investigator's opinions. Instead, he stated that he relied solely on the evidence and affidavits contained in the report.

On appeal, Mr. Lewis argues that the agency's position that the March 2003 memorandum does not apply to outside investigators violates principles of equal protection. We reject that argument because the agency has maintained that the memorandum does not have the force of law, either for internal or outside investigators. Mr. Lewis also challenges the deciding official's testimony that he did not consider the investigator's opinion when he decided to remove Mr. Lewis. Mr. Lewis quotes statements in the notice of proposed removal and the removal letter that indicate that the official who proposed Mr. Lewis's removal and the deciding official both relied on the investigator's report. Those statements, however, are not inconsistent with the deciding official's testimony. The deciding official did not testify that he did not rely on the report. He merely stated that he did not rely on the investigator's recommendation as to penalty. We therefore find that the Board did not err in rejecting Mr. Lewis's affirmative defense.

IV

Mr. Lewis also complains that the agency and the Board engaged in ex parte communications because the agency submitted hearing transcripts to the Board without serving Mr. Lewis with any transcripts or transmission of the communication. Because the agency provided the Board with accurate copies of the hearing transcripts and engaged in no other

communication, Mr. Lewis's argument is without merit.

V

Lastly, Mr. Lewis challenges the Board's determination that removal was an appropriate penalty. Because we uphold the Board's finding with respect to each of the charges against Mr. Lewis, and because removal was not a grossly disproportionate sanction for the charged misconduct, we sustain the Board's decision as to penalty.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DONALD R. LEWIS,
Appellant,

DOCKET NUMBER
DA-0782-060686-I-1

v.

DEPARTMENT OF AGRICULTURE,

DATE: October 3, 2007

Ronald L. Wilson, New Orleans, Louisiana, for the appellant.
Brandi A. Cain, Esquire, Washington, D.C., for the agency

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman
Barbara J. Sapin, Member

FINAL ORDER

The appellant has files a petition for review in this case asking us t reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R.

1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. 1201.115(d).Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R. 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United State Court of Appeals
for the Federal Circuit
717 Madison Place. N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. See

Pinat v. Office of Personnel Management, 931 F.2d 1544 (Fed. Cir. 1991)

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the courts website, http://fedcir.gov/contents.html. Of particular relevance is the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD: /s/
Matthew D. Shannon
Acting Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE
I certify that this Order was sent today to each of the following:

Certified Mail

Ronald L. Wilson
909 Pydras Street
Suite 2556
New Orleans, LA 70112

U.S. Mail

Donald R. Lewis
P.O. Box 29422
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Ms. Brandi A. Cain
Department of Agriculture
1400 Independence Ave.,
SW, Room 3312-S
Washington, DC 20250

October, 3, 2007
(Date)

/s/
Dinh Chung
Case Management
Specialist

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DALLAS REGIONAL OFFICE

Donald R. Lewis, Appellant, v. Department of Agriculture, Agency	DOCKET Number DA-0752-06-0686-I-1 DATE: May 10, 2007

Ronald L. Wilson, Esquire, New Orleans, Louisiana, for the appellant.
Brandi A. Cain, Esquire, and Steven Brammer, Esquire, Washington, D.C., for the agency.

BEFORE

Anna M. Love
Administrative Judge

INITIAL DECISION

On September 25, 2006, Donald R. Lewis filed an appeal from the action of the United States Department of Agriculture (USDA), National Finance Center (NFC or the agency), which removed him from his GS-14 Program Manager position, effective September 16, 2006. The Board has jurisdiction over this timely filed appeal pursuant to 5 U.S.C. §§ 7511-7513. At the

appellant's request, a hearing was conducted. Based on the following analysis and findings, the agency's action is AFFIRMED.

ANALYSIS AND FINDINGS

Background and undisputed facts

The appellant entered on duty with the National Labor Relations Board in 1971, as a Labor Management Relations Examiner. Appeal File (AF), Tab 13(4E) at 65-66. He later worked for the Department of Labor and, in February 1989, he transferred to the USDA, NFC, in New Orleans, Louisiana as a GS-12 Supervisory Labor Relations Specialist. His position was subsequently upgraded to a GS-13. In late 1997 or early 1998, he was selected to manage the newly created Morale Improvement Staff, which was later renamed the Equal Employment Opportunity and Workforce Services Staff (EEOWSS).[1]

At all times relevant to this appeal, the appellant was employed as the Program Manager, GS-340-14, for the EEOWSS at the NFC, where he supervised about 13 employees. *See* AF, Tab 13(4E) at 63. His duties included handling of discrimination complaints, prevention of discrimination, and resolution of all other complaints through alternative dispute resolution, mediation, conciliation, and facilitation. EEOWSS also processed Office of Workers' Compensation Programs (OWCP) payments. AF, Tab 13(4E) at 511, 521.

On March 28, 2006, NFC Deputy Director John White issued a notice proposing to remove the appellant from his Program Manager position

based on seven charges: (I) receipt of government funds without securing required management approval; (II) failure to take appropriate management action;
(III) allowing subordinate employees to conduct private business for personal gain using government time and equipment; (IV) directing subordinate employees to perform personal work or errands for him on government time and equipment; (V) taking retaliatory action against subordinate employees following their making protected disclosures during an official investigation; (VI) making false statements during an official investigation; and (VII) inappropriate management and personal conduct. AF, Tab 13(4Q); Tab 15 (Stipulations).[2] The appellant was placed in a paid, non-duty status as of March 28, 2006. AF, Tab 13(4P);
Tab 15 (Stipulations).
The appellant responded both orally and in writing to the proposal notice. AF, Tab 13(4F-4O); HEX B; *see also* Tab 15 (Stipulations). He denied that he committed most of the charged misconduct, accused several employees of fabricating their allegations, and questioned the validity of the investigation, which was conducted by a contract investigator, Kathryn T. Vengazo.[3] AF,
Tab 13(4F-4O); HEX B. On September 14, 2006, NFC Director Cyrus G. Lohfink, advised the appellant that he had decided to sustain six of the seven charges[4] and to remove him from his position. AF, Tab 13(4D).
The appellant was removed on September 16,

2006.[5] See AF, Tab 13(4C); Tab 15 (Stipulations). He timely filed the instant appeal, challenging the merits of the agency's case as well as the penalty. AF, Tab 1. He also asserted that the agency engaged in harmful error because Vengazo's investigation was conducted in violation of Keith Prue's March 24, 2003 memorandum.[6]

Burdens of Proof

The agency has the burden to prove the merits of its case by preponderant evidence. 5 C.F.R. § 1201.56(a)(1) (2007). A preponderance of the evidence is that degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue. 5 C.F.R. § 1201.56(c)(2) (2007). In addition, the agency must show that the penalty it selected was within the bounds of reasonableness and promotes the efficiency of the service. *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 302 (1981). The appellant has the burden of proving his affirmative defense by preponderant evidence.

The agency has proven that the appellant received government funds without securing required management approval.

Charge I of the proposal notice asserted the following in pertinent part:

The National Finance Center has a policy that all compensatory time earned must be used by the end of the leave year that is one year subsequent to the leave year in which the compensatory time is earned. If the compensatory time is not used

within that period, the right to compensatory time and overtime pay is forfeited by the employee. However, the NFC has a procedure through which employees who were unable to use their earned compensatory time during the specified period, "due to an exigency of the service beyond the employee's control," can be paid a lump sum for the unused compensatory time at the overtime rate at which it was earned by the employee. "**Upon supervisory approval**," compensatory time earned in one leave year, that is not used by the end of the next leave year after it was earned, can be paid to the employee in a lump-sum payment. Annual notices are issued that remind employees and managers of the procedural requirements for requesting and securing approval of these lump sum payments for unused compensatory time.[7] The notice issued to all NFC employees on November 1, 2004, titled, "Compensatory Time and Annual Leave Reminder," specifically stated, "Compensatory time (CT) earned in 2003 must be liquidated by the end of the current leave year (January 8, 2005). Every effort should be made to schedule and use CT before the end of the leave year after which it is earned. Employees who fail to use CT within that time, lose their right to both CT and overtime pay unless the reason they cannot use CT is due to an exigency of the service beyond the employee's control. Upon supervisory approval, CT earned in 2003 that is not used prior to January 8, 2005, will be paid at the overtime rate at which it was earned. Timekeepers must complete and submit Form AD-581, Lump-Sum

Leave or Compensatory Time Payments, to the Human Resources Management Staff (HRMS) prior to
January 8, 2005. CT must be used before annual leave is granted unless the employee has annual leave in excess of the maximum allowable carryover (usually 240 hours). Employees have a personal responsibility to be sure that they do not lose CT because of their failure to plan. Supervisors should also monitor this issue."[8]
NFC records reflect that you received lump-sump payments from 2000 through 2005 that total net payments of $29,495.05 and gross payments of $42,215.20 as detailed in the following chart:

Date Received	Number of Hours Paid	Net Pay Received	Gross Pay Received
08/08/00	219.3	$3,803.63	$5548.69
02/08/01	250.75	4,494.90	6,557.11
02/09/02	304.75	5,799.07	8337.96
01/27/03	310	6,110.28	8,785.45
01/23/04	230.75	4,891.96	6,837.12
02/02/05	137.25	3,027.57	4,237.41
04/12/05	62	1,367.64	1,911.46
Totals	1,514.8	$29,495.05	$42,215.20

There is no record of the required forms being submitted to NFC management and HRMS for

required approvals prior to your receipt of any of these payments.

Myloc Nguyen provided to the investigator copies of Forms

AD-581 from your office records that were dated January 27, 2003, January 23, 2004, February 1, 2005.[9] The forms were signed by Diane Barnes (2003 and 2004) and Myloc Nguyen (2005) in the blocks titled "33 Approval Authorized Official's Signature and Title." There is no record that approval of your supervisor was secured to authorize these payments, and there is no record that the forms were submitted to HRMS as required.

In your affidavit dated January 19, 2006, you stated regarding these lump-sum payments for compensatory time,

"The process requires that a Form 343 be completed for the employee. The timekeeper normally completes the form for the employee and whether the employee is required to sign the form or whether I have ever signed a form to request the payment for unused compensatory time. Myloc Nguyen is the timekeeper for EEOWSS and she also is currently the "table person" for EEOWSS. . . I have been following that process for most of my career at the NFC, including before I started working in EEOWSS and before Myloc Nguyen became timekeeper in EEOWSS. These payments have been processed under these procedures by many various timekeepers."[10]

Neither Ms. Barnes nor Ms. Nguyen has the authority to approve these lump sum payments for you. It is your responsibility, both as the supervisor of

these employees and as the recipient of Government monies, to ensure that required and appropriate approvals are sought and secured from your supervisor and from HRMS before you accept such funds or allow your subordinate employees to do so. Allowing your subordinate employees to misuse their table authority when you benefit financially from such misuse is an extremely serious breach of the trust placed in you as a manager and supervisor.[11]

There is no record on file that you ever sought or secured management approval prior to your receipt of the $42,215.20 detailed above. You are, therefore, charged with Receipt of Government Funds without Securing Required Management Approval, and you will be required to reimburse these funds to the NFC.

AF, Tab 13(4Q) (emphasis in original).

It is undisputed that the NFC's policy states that a lump sum payment for forfeited compensatory time can be claimed only when the reason or reasons for failing to use the compensatory time within the prescribed two-year time period was "due to exigency of the service beyond the employee's control," and after the employee receives appropriate supervisory approval. AF, Tab 15 (Stipulations); HEX 2. The parties stipulated that the appellant did not obtain supervisory approval for any of the six lump sum payments he received for forfeited compensatory time for fiscal years 2000 through 2005. *Id.* The appellant denied, however, that he intentionally received the aforementioned payments without supervisory

approval. He claimed that the paperwork for the payments was completed by his subordinate employees and that he was unaware that proper approval had not been obtained. See HEX 1, Vol. 1 of the appellant's deposition, pages 18-19 and HEX 9 (the appellant's admissions).

The appellant testified at the hearing that he thought his subordinates were handling his compensatory time payments properly since he had received lump sum payments for unused compensatory time every year from 1994 until 2005. He related that no one ever said anything to him about how the payments were being processed until Vengazo questioned him about it during his August 2005 interview. HT2 at 7B-11B.

The appellant admitted that the agency sent out annual reminders about forfeited compensatory time and that there was no reason why he would not have seen them. He also acknowledged that either he or his designee was present during senior staff meetings when forfeited compensatory time was discussed.[12] He added, however, that no one ever walked him through the process the way it was outlined in the proposed removal. The appellant conceded that he never tried to use all of his compensatory time before it was forfeited because he said he had too much work to do. He argued that he did not think he should be disciplined for merely failing to micromanage his employees regarding the procedure they used regarding his forfeited compensatory time. HT2 at 7B-11B.

The Board must review the agency's decision in an

adverse action solely on the grounds invoked by the agency. *Gottlieb v. Veterans Administration*, 39 M.S.P.R. 606, 609 (1989). If an agency chooses to label an act of misconduct, it is bound to prove the elements that make up the legal definition of that charge. *Otero v. U.S. Postal Service*, 73 M.S.P.R. 198, 202 (1997). In resolving the issue of how a charge should be construed, the structure and language in the proposal notice and the decision notice will be examined. *James v. Department of the Air Force*, 73 M.S.P.R. 300, 303-04 (1997). The nature of a charge should be construed in light of the accompanying specifications and circumstances. *Langham v. U.S. Postal Service*, 92 M.S.P.R. 268, ¶ 12 (2002).

My review of the language of Charge I and the narrative description in the proposal letter reflects that the agency did not charge the appellant with intentionally receiving the government funds at issue here. Moreover, Lohfink stated the following in his decision letter:

The need for requesting and obtaining the required supervisory review, determination, and approval of these payments is discussed at multiple Senior Staff meetings each year. These are meetings that you regularly attend. In addition, written instructions are published periodically, on two occasions during the period in question. From this information alone one can conclude that you should have known the rules and process associated with proper authorization of these payments. Your staff also directed and conducted training classes for members of the Thrift Savings

Plan Division where an encompassing coverage of time and attendance information was covered, including the proper procedures for obtaining authorization for these types of payments. From the three above-mentioned information sources (staff meetings, written instructions, and training prepared and conducted by your staff), one can conclude that you were aware of the proper process to follow in obtaining proper authorization for these payments.

As a supervisor, you are responsible for ensuring that your employees execute the proper procedures and follow the proper policies, especially related to the disbursement of funds. Allowing subordinate employees to misuse the system access authority they have to benefit you personally is an extremely serious offense and a breach of the trust placed in you as a supervisor and manager.

AF, Tab 13(4D).

After considering the entire record, I agree with Lohfink that, based on the appellant's longstanding high-level position with the agency, much of it in the personnel field, and the agency's annual reminders to all NFC employees about the handling of forfeited compensatory time, the appellant knew or should have known he was required to get supervisory approval prior to receiving payment for his unused compensatory time. In addition, while the appellant claimed to be unfamiliar with the process for handling forfeited compensatory time, he described with relative ease the similar procedures that must be

followed to restore forfeited use-or-lose annual leave, *i.e.*, the leave must be requested in advance and a supervisor must deny the leave request. HT2 at 11A-11B. Moreover, it is undisputed that the appellant was responsible for managing the OWCP program, through which his subordinate employees had the power to authorize payments and that his employees used their OWCP access to authorize his compensatory time payments. Hence, I find it to be inherently improbable that the appellant was unaware of the procedures required to receive payment for his unused compensatory time. *See Redschlag v. Department of the Army*, 89 M.S.P.R. 589, 602 (2001), *review dismissed*, 32 F.App'x 543 (Fed. Cir. 2002); *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987) (factors to be considered in making credibility determinations). Furthermore, I found the appellant's general demeanor while testifying, *i.e.*, his carriage, behavior, manner and appearance, demonstrated a lack of candor. In addition, as will be discussed more fully below in my analysis of Charge IV, the agency asserted that the appellant directed his subordinate employees to perform personal tasks for him including researching and writing a paper. The appellant testified that he intended to submit the research paper in question, which he conceded was written by one of his student employees, as his son's work product, without his son's knowledge, in order to obtain a benefit for his son, that is admission to a PhD program. Such behavior on the appellant's part

reflects a significant lack of honesty and integrity. Moreover, I find that the appellant also failed to satisfy the additional requirement for payment of his forfeited compensatory time, that he show that he was unable to use his compensatory time "due to an exigency of the service" beyond his control. The appellant testified that he never tried to use all of his compensatory time before it was forfeited and that the only reason he was going to lose it was because he was too busy working to take time off. Lohfink testified without contradiction that the mere fact that an employee is too busy to use his compensatory time does not satisfy the "exigency of the service" requirement. HT2 at 4A-7B.

Therefore, after considering the entire record, I find that the appellant knew or should have known that he received the gross amount of $42,215.20 in government funds without following the agency's required procedures. Furthermore, based on the structure and language in the proposal notice and decision letter, I find that, even though Lohfink testified at the hearing that he believed the appellant intentionally failed to follow the correct procedures, the agency was not required to show improper intent or motivation on the appellant's part to prove its charge.[13] Thus, I find that the agency has met its burden of proving that the appellant received government funds without securing the requisite management approval. Therefore, Charge I is sustained.

The agency has shown that the appellant failed to take appropriate management action.

Charge II of the proposal stated the following in relevant part:

You failed to take appropriate management action when two of your subordinate employees complained to you about the sexually harassing conduct of a contract employee. . . .

NFC's Management and Directives Manual, Title VII; Chapter 17, Equal Opportunity; Directive 1, Equal Employment Opportunity (EEO) Program, dated February 12, 1997, states in pertinent part, "2. Policy

NFC management is firmly committed to a positive EEO program for all employees.

A. It is NFC policy to provide equal opportunity to all persons regardless of their race, color, religion, sex, sexual orientation, marital status, national origin, age, or mental or physical handicap. A positive, continuing program is maintained to ensure that this policy is reflected in all of our personnel operations, including the employment, training, promotion, and treatment of all employees. . .

D. **Sexual harassment will not be tolerated within NFC. Managers and supervisors at all levels will ensure that their work areas are free from all forms of sexual harassment. It is expected that managers will take prompt, effective action when an indication of sexual harassment arises**. . .

E. . . . Persons who participate in the processing of complaints will be free in all respects from interference, coercion, or reprisal . . . ."[14]

Specification A.

Adimu Kushindana testified under oath that she

and Julie Nguyen complained to you several times about a contract employee named "TL" May, who inappropriately touched Ms. Kushindana and made inappropriate remarks of a sexual nature to Ms. Nguyen. Ms. Kushindana testified that you laughed at their complaints even though they explained to you that they were very serious. Ms. Kushindana testified that, instead of handling their complaints with a sense of urgency as required of your position as EEO manager, you teased Ms. Nguyen and her about "TL." Ms. Kushindana testified that she and Ms. Nguyen eventually went to Erroll Williams in NFC Facilities, and he and his superiors saw the importance of taking action to correct the situation and did so. Ms. Kushindana testified that you became upset when she and Ms. Nguyen went to Mr. Williams and that you denied knowing about their concerns. Moreover, even after the matter with TL was resolved, you continued to tease and joke about the situation.

Specification B.

Julie Nguyen testified under oath that problems with "TL" began on February 9, 2005, when he said to her, "I like women. I like having sex and you do too. You know you like it too." Ms. Nguyen testified that, later that same day, she and Ms. Kushindana told you of this incident with "TL" and Ms. Kushindana told you that "TL" had hugged her. They both told you that TL's actions made them uncomfortable. Ms. Nguyen reported that you did not take her or Ms. Kushindana's remarks seriously and that you laughed about it.

Ms. Nguyen testified that on February 10 and

February 11, 2005, and again on February 14, 2005, you asked her, "How's TL?" On the latter occasion, Ms. Nguyen told you that she was going to tell TL that he would get her in trouble with you if he came to the office to talk to her. You told her you would not support her with that statement.
Again on February 15, 2005, TL came to the office and tried to talk to Ms. Nguyen. She told him she was busy working. You later asked her while laughing, "How's TL?"
On February 16, 2005, TL came to the office again. On this date, you again asked Ms. Nguyen, "How's TL?" Ms. Nguyen told you that she did not want you to mention TL's name to her again. You just laughed.
On February 17, 2005, Ms. Nguyen again asked you to talk to TL for her. You did not answer her.
Ms. Nguyen and Ms. Kushindana then decided to go to Mr. Williams because you would not help them. Mr. Williams, Kraig Kittel and Debbie Byrne, Chief of the Administrative Management Staff, immediately took action to keep TL out of the NFC facility and Ms. Kushindana and Ms. Nguyen to provide written statements about what had occurred.
Ms. Nguyen further testified that, on February 23, 2005, Patty Duvernay told her that you were mad at her for going to Mr. Williams about the TL matter. Ms. Nguyen told Ms. Duvernay that she had asked you three times to help her but you had not.
On March 17, 2005, you again teased Ms. Nguyen and Ms. Kushindana about TL. You said that, when a visitor from the USDA Office of Civil Rights visited

NFC, you would get a pass for TL to come to the facility just for Ms. Kushindana and Ms. Nguyen. You also said that maybe TL just wants to be Ms. Nguyen's "uncle". Ms. Nguyen found this to be a very offensive remark because this term has a sexual and financial connotation. Ms. Nguyen testified that she asked you many times to stop teasing her, but you did not stop because you thought it was funny.

Your conduct described in this charge is extremely serious. You are the NFC's manager of equal employment opportunity and civil rights. As such, you are responsible for ensuring that all managers immediately deal with allegations of sexual harassment and discrimination, regardless of the source of the prohibited conduct. You are held accountable for your actions, or failure to act, as described in the USDA and NFC instructions cited above.

You were repeatedly asked by your subordinate employees to intervene and take action to ensure that prohibited activity ceased. You had the authority and responsibility to do this and ensure that your workplace was not a hostile work environment. Instead, you made light of the employees' complaints and ridiculed them in front of their peers.

Based on the above Specification, you are charged with Failure to Take Appropriate Management Action. Your failure to take action in this instance is a serious failure on your part to fulfill your critical duties as the EEO manager and as a manager of employees of the NFC. As the EEO

manager, you are responsible for implementing the USDA and NFC policy that prohibits discrimination in all forms and the creation or existence of a hostile work environment for your subordinate employees. Your cited conduct is seriously negligent and reprehensible in this regard and renders you unsuitable to continue in a position of responsibility at this facility.
AF, Tab 13(4Q) (emphasis added).
The record reflects that the NFC is physically located in a National Aeronautics and Space Administration (NASA) facility. Government contractor, Lockheed Martin, is NASA's tenant contractor. The NFC contracts with Lockheed Martin for various infrastructure and labor services. A subcontractor, Coast Industries, provides labor services to the NFC through Lockheed Martin. AF, Tab 22, Hearing Tapes from December 11 and 12, 2006 (HT1) at 7B-8A (Debra A. Byrne); Tab 13(4E) at 344 (Byrne's November 23, 2005 affidavit) and 476 (Kraig Kittel's December 2, 2005 affidavit).
It is undisputed that, sometime in February 2005, a Coast Industry employee, T.L. May [hereinafter "T.L."], made inappropriate comments of a sexual nature to EEOWSS employee, Julie Nguyen, and gave EEOWSS employee, Adimu Kushindana, an unwanted hug. See AF, Tab 13(4E) at 524-25 (the appellant's January 19, 2006 affidavit). It is also unquestioned that Julie Nguyen reported T.L.'s conduct to Erroll Williams, an IT Support Specialist, who worked for Debra A. Byrne, Head of the NFC's Administrative Management Staff. On February 17, 2005, at Byrne's request, Julie Nguyen and

Kushindana provided sworn statements regarding T.L.'s actions. See AF, Tab 13(4E) at 478 (Nguyen's February 17, 2005 affidavit) and 479 (Kushindana's February 17, 2005 affidavit). The appellant claimed that he took appropriate action because he did not learn about Nguyen's and Kushindana's problems with T.L. until the very day that they went to Williams and that he immediately telephoned Byrne to report the matter. See AF, Tab 13(4E) at 524-25 (the appellant's January 2006 affidavit) and HEX 1, Vol. 1 of the appellant's deposition, pages 40-44. Hence, the issues to be decided here are when did the appellant first learn of T.L.'s arguably sexually harassing behavior[15] and whether he took appropriate and timely action thereafter.

Debra Byrne testified at the hearing that she has known the appellant for over 20 years. She stated that, sometime in February 2005, Williams told her that Julie Nguyen reported to him that T.L. had made a sexual comment. She recalled that Williams said Nguyen indicated that she was having an ongoing problem with T.L., that she had told her supervisor, the appellant, about T.L., and that the issue was not resolved. Byrne remembered that, after she spoke to Williams, she tried to telephone the appellant but, because he was unavailable, she spoke instead to his "second in command," EEO Specialist Patricia Duvernay. She said she asked Duvernay what was going on and that she told Duvernay to have the appellant contact her immediately to discuss the problem. Byrne related that she also advised Duvernay that she needed a statement from Nguyen. HT1 at 7B-

8A.
Byrne explained that, the same day that Williams reported T.L.'s conduct to her, she instructed NFC contracting officer, Kraig Kittel, to tell Coast Industries to remove T.L. immediately from the NFC facility. She added that Coast Industries wanted a written statement about T.L.'s behavior for their records. Byrne remembered that, by the end of that day, the appellant returned her call and that she advised him that she considered the situation to be serious, she told him what she had done regarding T.L., and she instructed him to get a statement from Julie Nguyen. She added that Nguyen's statement was given to Coast Industries and T.L. was removed from NFC's building that day. HT1 at 7B-8A.
Byrne further related that, because Julie Nguyen reported that the problem with T.L. was "ongoing," when the appellant returned her telephone call, she told him that she was shocked that nothing had been done earlier. She pointed out that in her November 23, 2005 affidavit, found at AF, Tab 13(4E) at 344, she averred that Williams said Nguyen indicated that she tried "to handle it internally with her supervisor but that the situation was persisting." Byrne testified that she did not recall getting a message from the appellant about Julie Nguyen before she telephoned him that day. She indicated that the appellant "chuckled" when she told him that she considered the matter to be serious. Byrne said she only remembered asking for a statement from Julie Nguyen and not for one from Kushindana. HT1 at 7B-8A.

Byrne related the following in relevant part in her November 23, 2005 sworn statement:

Ms. Nguyen also came to me and told me that TL's remarks were unwelcome and that she had tried to avoid contacts with him and that she had complained to Mr. Lewis about them.

I contacted Mr. Lewis about the allegations and was told that Ms. Nguyen had complained to him about the situation but he had not taken her complaint seriously. I informed Mr. Lewis that Ms. Nguyen was very serious regarding the allegations and she wanted the situation addressed promptly. I also informed Mr. Lewis that Lockheed Martin was already contacted about the situation. . . .

AF, Tab 13(4E) at 344-45 (emphasis added).

Adimu Kushindana testified at the hearing that she worked for the appellant in EEOWSS from late 2000 until his removal. She added that she had previously worked for him in the late 1980s as a Clerk Typist and Staffing Clerk when the appellant was the Supervisory Labor Relations Specialist in Human Resources. Kushindana recalled that contract employee, T.L., frequently came into the EEOWSS area. She indicated that, on February 9, 2005, T.L. approached her while she was standing near the copy machine and, after looking her up and down, he commented that she looked good. She said that, despite turning her shoulder towards him, T.L. gave her a lingering hug that made her feel uncomfortable. She related that, because the appellant's office was near the copy machine, she immediately went into his office and asked him if he had seen or heard what just happened with T.L.

She indicated that the appellant said he had not seen anything but that he thought he had heard T.L. say something to her. She said she told the appellant what happened and she asked him to talk to T.L. and to tell him to stop coming to their office so often. Kushindana stated that, although T.L. had previously approached her in the cafeteria during the 2004 Christmas holiday season and had tried to hug her, it was not until the February 9th incident that she mentioned her discomfort to the appellant. She added that, prior to that day, she just hoped T.L. would stop coming around. HT2 at 2A-4A.

Kushindana testified that, on February 9, 2005, when she told the appellant what happened with T.L., he just laughed as though he thought it was funny. She said she did not think the appellant took her complaint seriously because he did not even make a note about what she told him. She stated that T.L. kept coming around and continued to make comments to her and to Julie Nguyen, which made them both feel uncomfortable. Kushindana explained that she and Nguyen were friends as well as co-workers in EEOWSS. She indicated that, prior to her encounter with T.L. on February 9, 2005, she and Nguyen had discussed that T.L. was making Nguyen uncomfortable. She remembered that Nguyen told her that T.L. had made a comment about liking sex. She recalled that, a few days after February 9, 2005, she and Nguyen went together to the appellant's office to tell him that they were serious about T.L. not coming into the EEOWSS office area and that they

wanted someone to talk to T.L. Kushindana said the appellant laughed at both of them. HT2 at 2A-4A.

Kushindana indicated that, on February 17, 2005, she and Julie Nguyen decided to go to Williams about T.L. because Williams worked with T.L. She testified that they also told Williams that they had complained to the appellant about T.L. and that nothing had been done because T.L. was still coming around. After they informed Williams what happened, he advised them that he was required to immediately report their allegations to his manager, Byrne. She added that, on that same day, Duvernay asked her for a written statement about what had happened with T.L. She pointed out that the appellant had not previously asked her for a statement about T.L. Kushindana identified AF,

Tab 13(4E) at 497 as the statement she gave on February 17, 2005, at Duvernay's request. She said she did not mention the appellant's lack of response in that document because she was asked for a statement about T.L. and she, therefore, was focusing on what happened with T.L. She stated that, on February 17th, Williams told her that they would not have to worry about T.L. anymore because T.L. had been told to stay out of their building. She added that she never saw T.L. again after February 17, 2005. HT2 at 2A-4A.

Kushindana testified that Kraig Kittel later asked if there were any witnesses to T.L.'s actions.[16] She recalled that, thereafter, she prepared the March 21, 2005 statement found at AF, Tab 13(4E) at 498.

She explained that, when she prepared the March 21st document, her intent was to identify the appellant as a possible witness because she thought he might have heard what happened at the copy machine on February 9, 2005. HT2 at 2A-4A.

At the hearing, Kushindana denied the appellant's allegation[17] that, in August 2005, she told him that she was going to run him off. She recalled, however, a conversation she had with the appellant after he told her that he had not been selected for a GS-15 position. She said she asked him if he was going to retire and that he said he was not. Kushindana indicated that RIF notices were issued in July or August 2005, and that the RIF was to be implemented in September or October 2005. She stated that, in February 2005, she was not aware that there was going to be a RIF in EEOWSS. However, she acknowledged that there was a "data call" in October 2004[18] and that "maybe" they received a memorandum in January 2005 regarding a RIF and that a RIF might have been mentioned in a February 2005 meeting for all NFC employees. Kushindana noted, however, that there were at least two RIFs at the NFC and that TSP employees were RIFed in 2004. She conceded that she and Julie Nguyen were friends and that she did not want Nguyen to get RIFed. She also related that she, and probably Lorri Clark, Julie Nguyen, and Pat Bachemin thought Myloc Nguyen should have been the one to get RIFed because Myloc Nguyen was not a very productive employee. Kushindana denied that she ever told

the appellant that he could expect problems if he RIFed Julie Nguyen. HT2 at 2A-4A.
Kushindana confirmed that she averred in her December 8, 2005 affidavit that the appellant was "very vindictive to the point of checking people's garbage cans trying to 'find something on them.'"[19] She indicated that, when she worked for the appellant in the late 1980s, it was a running joke in Human Resources that if there was no plastic bag in your trash can, the appellant was probably rummaging through your trash. She related that she applied to work for the appellant in EEOWSS in 2000, because she was bored with the work she was doing, she thought EEOWSS would be more challenging, she believed the appellant had a "great vision" for the EEOWSS program, and the appellant had never been vindictive towards her. She added that she also hoped the appellant had changed since she worked for him the 1980s. Kushindana acknowledged that she specifically sought out a detail to EEOWSS even before she applied to work there. HT2 at 2A-4A.
Kushindana also conceded that she wrote in her December 2005 sworn statement that the appellant "makes me very uncomfortable when I have to go into his office. He always stares at my body, up and down. When I have to go into Mr. Lewis' office, I sometimes carry a folder to place in front of me to block Mr. Lewis' stares a little bit."[20] She stated that her use of the word "always" in her December 2005 statement was probably too strong but she said he did it "quite a bit."

Kushindana related that this allegation in her affidavit was the only time she ever told anyone, except maybe one of the students, that the appellant made her uncomfortable in this way and that she had not previously felt she needed to report it. She explained that when she was preparing her affidavit in December 2005, she started to write down everything she remembered and one of the things she recalled was that the appellant made her uncomfortable by the way he looked at her. She confirmed that she did not mention this in either her February 17, 2005 or March 21, 2005 statements. Kushindana said the appellant never tried to hug her or made any suggestive comments. HT2 at 2A-4A.

Julie Nguyen testified at the hearing that she worked for the appellant in EEOWSS from July 2001 until August 2005. She related that, on February 9, 2005, T.L. came into her cubicle and made the "I like having sex" comment cited in the notice of proposed removal. She indicated that, after T.L. left, she went to the appellant's office where she found Kushindana talking to the appellant about T.L. She recalled that she said to Kushindana, "You too?" Nguyen stated that she then told the appellant what T.L. had said to her and how it made her feel and that he just "laughed it off." She said that T.L. made her scared and nervous and that the appellant's reaction made her feel that he was not taking her concerns seriously. Nguyen noted that she had not previously asked the appellant to intervene concerning T.L. because he had not made a sexual comment like

that to her before. She indicated that she did not ask the appellant to do anything specific regarding T.L. on February 9, and that all she did was to tell him what T.L. had said and that it made her uncomfortable. HT1 at 2A-5A.

Julie Nguyen testified that, during the next two weeks, she went back to the appellant approximately three times because T.L. kept coming into the EEOWSS area. She recalled that, because she did not feel that the appellant was taking her concerns seriously, she discussed the matter with Kushindana and that they went to the Facilities section and told Williams what T.L. said to her on February 9th. Nguyen indicated that, after she and Kushindana spoke to Williams, Kraig Kittel came to their office and asked her and Kushindana for a statement about T.L. She said the appellant had not previously asked her for a statement about T.L. She added that, after February 17, 2005, T.L. did not come around again. HT1 at 2A-5A.

Julie Nguyen remembered that the appellant asked Duvernay to help her write her February 17, 2005 statement. She related that she told Duvernay that she had previously gone to the appellant three times about T.L. but that Duvernay did not include this information in the statement Duvernay typed up for her.[21] She explained that she later typed up her own four-page statement[22] and she asserted that the underlined portions of that statement were omitted by Duvernay from the single-page February 17th statement, which was given to the appellant.[23] Nguyen identified AF, Tab

13(4E) at 662-63 as an unsigned copy of the two-page statement she later provided to Kittel.[24] She said she also did not include the underlined portions of her four-page statement in the two-page report she provided to Kittel because the appellant said he was going to read that statement and she was concerned about him seeing her comments. HT1 at 2A-5A; *see also supra* n.16.

On cross examination, Julie Nguyen said that her February 17, 2005 statement was not her "true statement." She also related that she had not included everything in the two-page statement she gave to Kittel[25] because it did not contain the underlined portions of her four-page statement found at AF,

Tab 13(4E) at 664-67. Nguyen said she believed that she gave her two-page report to Kittel on February 17, 2005 and, therefore, she could not say why it was dated March 22, 2005. She thought the two-page statement should have been dated February 17, 2005. She added that she left the underlined portions of her four-page statement out of her other two reports because she was afraid the appellant would read them. Nguyen noted that she was asked to provide two statements and, to her knowledge, they were both shown to the appellant. Nguyen further explained that when she testified that the information was untrue in her February 17, 2005 statement and her subsequent two-page statement, she really meant that the two statements were incomplete because they did not contain the information about the appellant,

which she included in her four-page statement. HT1 at 2A-5A.

Julie Nguyen denied that she and EEOWSS employee, Patricia Bachemin, were trying to get rid of the appellant.[26] She said she included an allegation concerning the appellant's treatment of Bachemin at the end of her four-page statement because she had seen the way he treated employees like Bachemin who complained about him. She denied that Bachemin asked her to include that comment in her four-page statement and she indicated that she never showed the four-page statement to Bachemin, Kittel, or the appellant. Nguyen said she only showed her four-page statement to her NFC co-worker, Monique Price, and that she later provided a copy to Vengazo. She related that she could not recall if she showed it to Lohfink when she and Bachemin met with him on February 19, 2005.[27] HT1 at 2A-5A.

Julie Nguyen testified that, beginning in 2005, but especially after the investigation started, the appellant was mean and threatening and that she feared retaliation. She stated that, even though she did not like working for the appellant, she did not attempt to transfer. Nguyen recalled that, during the February 19, 2005 meeting, Lohfink offered twice to transfer her to another position at the NFC but she declined. She explained that she went to the meeting with Lohfink because she wanted someone to know that the appellant was not a good manager and that EEOWSS was not a good place to work. She conceded that she did not tell Lohfink on February 19, 2005, that the

appellant had teased her about T.L. She added, however, that the appellant had teased her about T.L. in front of Kushindana. She further related that, because Duvernay was the appellant's second in command, she felt that she had to watch her back around Duvernay and, therefore, she only talked to Duvernay about work. At the hearing, Nguyen said she feared that T.L. would rape her. She conceded, however, that, prior to the hearing, she had never before voiced that concern. HT1 at 2A-5A.

Julie Nguyen testified that, in approximately July 2005, after she complained to Williams about T.L., she was notified that, pursuant to a reduction in force (RIF), she was going to be reassigned as of September 30, 2005 from her GS-7 EEO Assistant position in EEOWSS.[28] She asserted that, based on their respective years of service, she believed that Myloc Nguyen should have been subjected to the RIF instead of her. Julie Nguyen indicated that her reassignment did not go into effect until November 2005, when NFC employees returned to New Orleans after Hurricane Katrina.[29] She said that she filed a retaliation complaint because the RIF came after she complained about T.L. She asserted that the appellant was given the option of which position to "close" and she felt that he selected hers because she had complained. She acknowledged that she blamed the appellant for her being RIFed out of EEOWSS. HT1 at 2A-5A.

Julie Nguyen also recalled that the day after Thanksgiving in 2004, she encountered Myloc Nguyen in the grocery store. She said that Myloc

Nguyen mentioned that she had heard that Julie Nguyen was going back to the Thrift Savings Plan (TSP) section of the NFC.[30] She explained that she did not want to go back to TSP because the TSP section was going to be closed. She said that, thereafter, she felt that she had to watch her back around Myloc Nguyen and the appellant because she suspected that the appellant had something to do with Myloc Nguyen making that comment. HT1 at 2A-5A.

Jo Ann Thomas[31] testified that she worked for the appellant in EEOWSS since 1997, and that, when she retired in December 2005 she was a GS-13 EEO Counselor. She recalled that neither Julie Nguyen nor Kushindana complained to her about T.L. She said she also never heard the appellant tease Julie Nguyen or Kushindana about T.L. HT1 at 7A-7B.

Myloc Nguyen testified that she worked in EEOWSS from December 2000 until July 2006 as a GS-5 Conflict Management Assistant. She said she was reassigned in July 2006 to another position at the NFC. Prior to working in EEOWSS, she was employed at the NFC for the TSP and/or the Financial Services Division from June 1999 to December 2000. Myloc Nguyen indicated that her EEOWSS duties included processing time and attendance data and OWCP claims. She pointed out that she was Julie Nguyen's distant cousin and that she knew Julie Nguyen before she started to work at the NFC. She added that she had a good relationship with Julie Nguyen until she received her RIF notice sometime in June or July of 2005. Myloc Nguyen stated that Julie Nguyen blamed

her for getting RIFed and Julie Nguyen stopped talking to her after that. HT2 at 1A-2A.
Myloc Nguyen further related that, before the RIF, Kushindana did not complain about the appellant. She noted that Clark had complained about the appellant but she never knew why. Nguyen said she thought Jo Ann Thomas had a good relationship with the appellant and she did not know anything about Bachemin's relationship with the appellant. She remembered that some of her co-workers, including Kushindana, Bachemin and Julie Nguyen, thought the appellant liked her and gave her special favors, which she denied. Nguyen also said that the appellant never promised to promote her and that she was employed in EEOWSS as a GS-5 from the time she started there in 2000. Nguyen recalled that Lohfink suspended her for two weeks for performing work on her outside businesses on government time. HT2 at 1A-2A.
Kraig Kittel reported in his December 2; 2005 affidavit that statements were obtained from several female employees in EEOWSS which corroborated Julie Nguyen's allegations. AF, Tab 13(4E) at 476. He noted that he was attaching copies of those statements to his affidavit. Specifically, he said he was attaching, as "Tab A," Julie Nguyen's and Kushindana's February 17, 2005 statements, which were given to Coast Industries,[32] and, as "Tab B," statements from Julie Nguyen, dated February 17, 2005 and updated on March 22, 2005, from Bachemin dated March 17, 2005, and from Kushindana dated February 17, 2005 and

updated on March 21, 2005.[33]
The record further reflects that Julie Nguyen and Bachemin met with Lohfink on February 19, 2005. See HEX 7 for Lohfink's notes from this meeting. Lohfink recorded that Julie Nguyen stated the following in relevant part:
She described how a custodial employee (contracted employee) was making inappropriate comments and liked to touch her and other EEOWSS employees as well as other female employees at NFC. Upon further questioning for details, she described how she and Ms. Adimu Kushindana, also from EEOWSS, had discussed their concerns with Mr. Lewis and he did nothing to resolve the situation. I asked how long this was going on and was told that it had been going on for "quite a while." I asked if they knew what Mr. Lewis had done in response to their bringing this to their attention. She responded that he did nothing but make fun of the situation and further insulted and teased them about the employee and what they had told Mr. Lewis what the employee had done to them.
Id. (emphasis added).
Patricia Duvernay testified at the hearing at the appellant's request. She indicated that she had worked for the appellant in either Human Resources or EEOWSS since approximately 1989. Duvernay recalled that on August 19, 2005, she was asked to meet with an investigator. She explained that she was "appalled" and in disbelief that the appellant was being investigated. She noted that, although Vengazo interviewed her on

August 19, 2005, she did not get a copy of her draft statement to review until December 2005. She identified AF, Tab 13(4E) at 413-18 as the completely revised affidavit she sent back to Vengazo. HT1 at 11A and 11B.

Duvernay testified that, on February 17, 2005, Byrne contacted her at about 11:00 a.m. and said she was returning a call the appellant had made to her.[34] She recalled that Byrne asked her what was going on with T.L. and told her that the appellant needed to get sworn statements from Julie Nguyen and Kushindana. She indicated that, when the appellant returned to the office, she told him that Byrne wanted statements from Nguyen and Kushindana right away and that the appellant, thereafter, told Nguyen and Kushindana to prepare statements. HT1 at 11A and 11B.

Duvernay remembered that Julie Nguyen was apprehensive and uncomfortable about preparing her statement and that she asked Duvernay to help her since she had taken sworn statements before as a Certified Misconduct Investigator for the USDA. She added that Julie Nguyen sometimes had a problem expressing herself in writing and, therefore, occasionally Nguyen would ask her to read something she had written to check her grammar. Duvernay stated that she asked Nguyen to tell her what happened and, as Nguyen dictated, she typed the statement on her computer. She said she told Nguyen she would email the statement to her and that, after she reviewed it and made any necessary changes,

she should sign and date it and return it to the appellant. Duvernay stated that she never saw Julie Nguyen's statement again after she emailed her the draft and that she did not know if Nguyen made any changes to it. She indicated that the document found at AF, Tab 13(4E) at 656 looked like what she had written for Julie Nguyen on February 17, 2005. HT1 at 11A and 11B.

Duvernay related that Julie Nguyen never mentioned anything about the appellant when she was dictating her statement to her on February 17, 2005. She said she did not even know the appellant was at issue at that time. She emphasized that she thought the matter involved only T.L. because Byrne said she wanted a statement about T.L. She opined that, if the statement was supposed to be about the appellant, Byrne would have told her to send the statements directly back to her and not through the appellant. Duvernay denied that she left anything out of the statement that Julie Nguyen gave to her on February 17, 2005, and she said she was not aware until Vengazo interviewed her that Julie Nguyen was accusing her of mischaracterizing something in her statement. HT1 at 11A and 11B.

Duvernay testified that the appellant always took seriously allegations like the ones made by Julie Nguyen and Kushindana. She said she had no knowledge of the appellant teasing Julie Nguyen about T.L. and she added that she did not even know who T.L. was and that the first time she heard about the complaints was when Byrne called

asking for statements. She further related that she was not in the appellant's office when either Julie Nguyen or Kushindana complained to him about T.L. HT1 at 11A and 11B.

In her January 18, 2006 sworn statement, Duvernay averred that up until the point that Byrne wanted statements about T.L., "I had no knowledge of these incidents. I do not know TL, did not see the incidents occur, and still do not know who TL is." AF, Tab 13(4E) at 415. However, in her April 22, 2006 letter to J. Douglas Sunseri, the appellant's attorney at that time, she wrote the following:

[I]t would be difficult to believe that Mr. Lewis failed to take appropriate action. Julie did not initially complain about T.L. saying anything that offended her, just that he was becoming a nuisance by visiting her so often. Julie insisted that Mr. Lewis not say anything to T.L. because she felt if she just began to ignore him, he would stop coming to her desk. The morning Julie told Mr. Lewis about T.L.'s inappropriate remarks, he immediately contacted Debbie Byrne to report the incident. Although I do not know the specific date of this incident, I know it occurred sometime in early February and he reported the incident and obtained the statements on the same day.

HEX 1 at 1-2 (emphasis added).

When asked at the hearing to explain some of the comments she made in her April 22, 2006 letter to Sunseri, Duvernay conceded that no mention was made in the sworn statement she helped Julie Nguyen write on February 17th about T.L. becoming a nuisance and Nguyen telling the appellant not

to say anything about T.L. She testified that, when she helped Julie Nguyen prepare her February 17, 2005 statement, Nguyen must have told her then that T.L. was "becoming a nuisance" because she never talked to Nguyen about T.L. after that day. She said that Nguyen did not want to include that information in her February 17th affidavit and that she only wanted to discuss T.L.'s inappropriate comment. She said that Nguyen also told her on February 17th that she "insisted that Mr. Lewis not say anything to T.L." She added that Nguyen did not want anything done about T.L. before he made the sexual comment. HT1 at 11A and 11B. At the hearing, the appellant testified that, prior to February/March of 2005, everyone in EEOWSS seemed to coexist harmoniously. He recalled that he had problems with Patricia Bachemin when she was not promoted in 2004 and that, by late January/early February 2005, she started "stirring the pot" because her promotion was coming up again later in the year. He explained that Bachemin was hired under a vacancy announcement which advertised for a GS-7, 9, 11, and 12 EEO Specialist. He said that position descriptions were only written at the GS-7, 9 and 11 levels and that there was no GS-12 position description. Therefore, when Bachemin would have been eligible for promotion to the GS-12 level, she blamed him for not having written a GS-12 position description.[35] The appellant claimed that Kushindana has multiple personalities, slept with a co-worker in the backseat of a car, and made multiple copies of a church flyer using the

government copy machine. HT2 at 7B-11B.
The appellant further related that the RIF also resulted in hard feelings among his subordinates. The appellant indicated that the NFC underwent three iterations of a RIF, commencing with the closure of the TSP section. He added that he was told that he would have to eliminate two positions in EEOWSS and that he should use his own judgment in determining which positions to cut.[36] The appellant stated that the RIF would have "hit the press" sometime in October 2004, and that, in late 2004/early 2005, rumors of a RIF began floating around the NFC. He remembered that they had a "data call" in November 2004, where all NFC employees were asked to provide basic information regarding their prior service in anticipation of a RIF. He noted that in about March 2005, he informed his employees that EEOWSS was losing two positions and RIF notices were sent out in July 2005.[37] The appellant pointed out that when Julie Nguyen encountered Myloc Nguyen in the grocery store in November 2004, he had not yet communicated anything to Julie Nguyen about her being RIFed. HT2 at 7B-11B.
The appellant testified that the first time he ever heard the name "T.L." was when Julie Nguyen commented that the appellant should get his hair cut like T.L. He said, at that time, he did not know who she was talking about. He indicated that, on February 17, 2005, Julie Nguyen complained to him for the first time about T.L. making the comment about liking sex. He added that, within a short period of time, Kushindana also complained to

him about T.L. that same day, at about noon. He noted that Julie Nguyen and Kushindana came to him separately about T.L. The appellant related that, because he found T.L.'s comment to Julie Nguyen to be offensive and inappropriate, and Kushindana's concerns to be serious, he promptly telephoned Byrne to get the problem resolved. He noted that he telephoned Byrne some time "mid-morning" to report Nguyen's and Kushindana's allegations but Byrne was not there. He said he left Byrne a voicemail message that both Nguyen and Kushindana were having sexual harassment problems with T.L. HT2 at 7B-11B.

The appellant remembered that, when Byrne returned his call, he was not available and she spoke instead to Duvernay. He recalled that Byrne told Duvernay to tell him to get statements from Julie Nguyen and Kushindana about T.L. The appellant added that, because he had noticed T.L. frequenting Nguyen's cubicle, he previously asked her if there was a problem but she had not expressed any concerns about T.L. until that day and, therefore, he did not realize there was anything he needed to do about T.L. HT2 at 7B-11B.

The appellant testified that, after he spoke to Byrne about the matter, he called Kushindana and Julie Nguyen into his office and told them to provide him written statements about T.L. for Byrne. He added that he would have asked Nguyen and Kushindana for statements himself but that he wanted to check with Byrne before he did so because T.L. was her employee and he wanted to ensure that he obtained the information she

needed. The appellant related that he subsequently checked with Nguyen and Kushindana to make sure T.L. was not coming around any longer. The appellant denied that he made light of Nguyen's and Kushindana's complaints about T.L. and he said he never laughed or made any jokes about T.L. He stated that he smiled when Kushindana told him about what had happened with T.L. because of the animated way she described how T.L. hugged her and because she was smiling as she told the story. He offered that, because Kushindana knew him, she would have known that he was taking her allegations seriously even if he was smiling. He further related that he did not have the authority to take any action regarding T.L. other than to do what he did, which was report the matter to Byrne who was in T.L.'s chain of command. HT2 at 7B-11B. During the November 30, 2006 telephonic prehearing conference, in which the appellant participated, the parties confirmed that they had agreed to the
14 factual stipulations contained in the agency's prehearing submissions. *See* AF, Tab 17; *see also* AF, Tab 15 (Stipulations). Stipulation 12 states that: "Two of Appellant's subordinate employees, Julie Nguyen and Adimu Kushindana, complained to Appellant on February 9, 2005 that contract employee named "TL" was sexually harassing them in the workplace." AF, Tab 15 (Stipulations). The appellant testified at the hearing that the February 9, 2005 date in this stipulation was incorrect because he did not find out about the

problems with T.L. until February 17, 2005. He said he relied on his attorney in this regard and that he was not paying attention to the stipulations his attorney had agreed to. HT2 at 7B-11B.

In his January 19, 2006 affidavit, the appellant averred the following in relevant part about the T.L. incident:

I do not condone sexual harassment. I have never refused to report sexual harassment and would not refuse to do so. . . .

Some time later, days or weeks [after he inquired and Julie Nguyen told him that she was not having problems with T.L.], Julie came to me and said "TL" had come to her cubicle. She said "TL" said something to her about his liking sex and asked her if she did too. Julie said she did not want to report "TL" that she wanted me to talk to him.

Soon after this, on that same day, Adimu Kushindana came to me and said that "TL" was hugging her when greeting her and she did not like that. I asked her where was this taking place. She told me that this was taking place outside of the office. She said words to the effect of "why don't you talk to him?"

I remember calling Debbie Byrne sometime later that morning or around noon but she was out of the office. I left a message for her to call me and she did. I reported what Julie and Adimu had said. Shortly after that, Debbie phoned and left a message with Patty Duvernay asking me to get signed statements from both Julie and Adimu. I immediately requested the statements. I am fairly certain that they provided them to me that same

day and that I submitted them to Debbie right away. It is my understanding that Debbie then initiated appropriate action with regard to "TL" who was a contract employee.
AF, Tab 13(4E) at 524-25.
The appellant also related the following in pertinent part in his
January 2006 sworn statement:
I told the investigator that after the office learned on or about June/July 2005 that the EEO Assistant position occupied by Julie Nguyen at the time was being abolished as part of the upcoming [RIF] at the NFC, Adimu Kushindana approached me in my office and asked why I had decided to place Julie's position in the RIF rather than Myloc's position. Adimu was speaking in a manner and tone of voice that reflected that she felt I had to answer to her before making such [sic] decision. Speaking in the same authoritative voice, Adimu went on to tell me that "they" thought the staff should tell me who should be placed in the RIF from EEOWSS. I told Adimu that it was my decision as a manager and that I was not going to discuss my decision with her. At this point, Adimu threatened me by saying that there would be trouble for me placing Julie's position in the RIF rather than Myloc's. . . .
Adimu Kushindana threatened me because I made a management decision then that ultimately resulted in the reassignment of Julie Nguyen as part of the RIF effected October 28, 2005. Julie Nguyen has harassed me and reprised against me because of her being affected by the

RIF. Patricia Bachemin is harassing me because I will not sign and approve a fraudulent document to promote her. USDA, NFC, and agents have condoned and joined in the action against me. AF, Tab 13(4E) at 515, 530.

In his November 2006 deposition, the appellant asserted that he did take prompt and appropriate action upon learning about T.L.'s unwelcome actions towards Julie Nguyen and Kushindana. HEX 1, Vol. 1. of the appellant's deposition, pages 40-44. The appellant recalled that Nguyen had mentioned T.L. several times regarding his hair cut and that, even though she had not indicated any problems with T.L., because he had noticed him coming around to her cubicle, he asked her if she wanted him to talk to T.L. but she did not and she indicated that she just intended to ignore him. Within a day or two, however, Nguyen came to him about T.L.'s sexual comment. He added that, right after Nguyen told him about T.L.'s comment, Kushindana told him that T.L. had hugged her and that she did not like it. He claimed that he immediately telephoned Byrne to report what Julie Nguyen and Kushindana told him. He recalled that Byrne was unavailable, so he left a message about why he was calling and asked her to call him. He said that, when Byrne returned his call, he was not there and that she told Duvernay to get statements from Kushindana and Julie Nguyen. He added that the matter was cleared up that day or the next. He insisted that he contacted Byrne the same day that Nguyen and Kushindana complained about T.L.'s unwelcome conduct. He

said, prior to the day he called Byrne, Julie Nguyen never told him that T.L. was making her uncomfortable or was doing anything inappropriate.

After considering the record in its entirety, it is apparent that much time has passed since the problems with T.L. were reported to the appellant in February 2005, and memories may have faded. Also a RIF occurred in EEOWSS in July 2005, which may very well have caused some witnesses to now have a bias against the appellant. Nevertheless, I find that the agency has met its burden of proving that it is more likely true than untrue that the appellant was aware of the problems Julie Nguyen and Kushindana were having with T.L. prior to February 17, 2005. Even if I credit the appellant's assertion that he contacted Byrne on February 17, 2005 about the T.L. situation, I do not find credible his claim that this was the same day he learned of the matter.

I base this conclusion to a large extent on the testimony and prior sworn statement of Debra Byrne. In her November 2005 affidavit, Byrne, who had no apparent bias against the appellant or motive to lie, recorded that when she spoke to the appellant about Julie Nguyen's allegations, the appellant acknowledged that Nguyen had "complained to him about the situation but he had not taken her complaint seriously." AF, Tab 13(4E) at 344-45. At the hearing, Byrne testified in an unequivocal and straightforward manner that she was shocked that Julie Nguyen had said the problem with T.L. was "ongoing" and that the

appellant "chuckled" when she told him that she considered the matter to be serious. Had the appellant only just learned of the assertions that morning, he surely would have argued that point to Byrne. Byrne, however, did not mention in either her November 2005 statement or at the hearing that the appellant made any such argument. Moreover, as was discussed above, I have found the appellant's credibility to be questionable. Accordingly, I find that Byrne corroborated Julie Nguyen's and Kushindana's claims that they advised the appellant of their respective problems with T.L. days before they reported the matter to Williams.

NFC's policy on Prevention of Sexual Harassment is summarized in a "Pocket Guide." HEX 4. The appellant averred in his deposition that he developed the Pocket Guide. HEX 1, Vol. 1 of the appellant's deposition,
page 48. The Pocket Guide advises NFC employees who have experienced sexual harassment to report the matter to their manager/supervisor, EEOWSS, an EEO Counselor/Dispute Resolution Specialist, or the Human Resources Management Staff. HEX 4. According to the Pocket Guide, supervisors are to "[t]ake immediate action on observed or reported incidents." HEX 4. In his January 2006 affidavit, the appellant described an occasion when he said he took appropriate management action in response to a complaint by Myloc Nguyen about sexual harassment. AF, Tab 13(4E) at 524. He related that he told Myloc Nguyen that he had to report the

matter even though she said she did not want him to.

Hence, to satisfy his obligation as a manager, and more importantly as the Program Manager of the EEOWSS, one of the places the Pocket Guide instructs employees to report allegations of sexual harassment, the appellant should have immediately reported Julie Nguyen's and Kushindana's concerns about T.L. to Byrne or taken whatever other measures were necessary to ensure that T.L. stopped bothering his employees. Furthermore, in light of his position with the agency, I find disingenuous his claim that he did not have the authority to take any action regarding T.L. except to report the matter to Byrne. I find, therefore, that the agency has established by preponderant evidence that the appellant was aware of the allegations about T.L. for a period of days and that he did not timely report the matter. Thus, I find that the appellant failed to take timely appropriate management action with respect to both Julie Nguyen and Adimu Kushindana. Accordingly, both Specifications A and B are sustained and Charge II is proven.

<u>The agency has established that the appellant allowed subordinate employees to conduct private business for personal gain using government time and equipment</u>.

The agency related the following in relevant part under Charge III:

Under your management as the Chief of the EEOWSS, two of your subordinate employees, Adimu Kushindana and Mvloc Nguyen, have, by

their own admission, used Government time and equipment to work on activities related to their outside businesses for personal gain.

Specification A.

Myloc Nguyen admitted in an affidavit dated January 11, 2006, that she had used Government time and equipment (computers, software, copiers, printers, fax machines, telephone) to work on activities related to outside businesses that she owned and operated. These businesses included a restaurant and convenience store, among others that she admitted operating since 1984. Extensive documents were found on her NFC computer hard drive that she prepared and modified on Government time, printed and copied on Government printers and copy machines, and transmitted to clients and suppliers on the Government's fax machine. Included among these documents were also extensive documents that Ms. Nguyen prepared for her volunteer church activities. While occasional use of Government equipment for volunteer activities is permitted, it also must be restricted to an employee's personal (not Government) time. Ms. Nguyen engaged in extensive use of Government time and equipment despite the extensive prohibitions against use of Government equipment and time for personal gain.

The USDA Limited Use Policy . . . specifies that any personal use of Government telecommunications equipment must follow supervisory approval. Ms. Nguyen failed to secure this by her own admission. You indicated in your testimony that you were

aware of employees using Government equipment for personal use, yet neither your testimony, nor the testimony of your subordinate employees, stated that you ever reminded employees of the requirement that your approval is required before they are permitted to use Government equipment for non-Government purposes. . . .

Adimu Kushindana testified that she spoke to you about Myloc Nguyen's extensive use of Government equipment and time and that you responded by saying something to the effect that Ms. Nguyen is a person with initiative whose business sense you admire. When you were asked specifically about this during the investigative interview, you did not address the substance of what Ms. Kushindana raised with you, but instead questioned Ms. Kushindana's motives in bringing this misconduct to your attention because you asserted that Ms. Kushindana only raised the issue to question why you had decided in 2005 to abolish the position of Julie Nguyen rather than abolishing Myloc Nguyen's position.

When asked if you had personally witnessed Ms. Myloc Nguyen's use of the fax machine or printer, based on testimony from your staff, that you were witnessed handing a personal business document to Myloc Nguyen from the fax machine or printer, you stated that you made an effort never to look at documents that you handed to your staff members from the fax machines or printers. You attempted to rebut the significance of Myloc Nguyen's using the Government equipment and time for outside business activities by providing copies of two one-page religious documents that Adimu Kushindana

had allegedly copied and handed out to some members of the EEOWSS staff. You alleged that Ms. Kushindana made 400 copies of this document, but your assertion was not substantiated by any other source.

Specification B.

Adimu Kushindana admitted that she had used Government time and equipment to perform work for an outside business activity for personal gain. You testified that you were aware that Ms. Kushindana had used Government equipment and time to work on an outside activity for personal gain.

You also testified that you never confronted Ms. Kushindana with this information and never told her to cease the prohibited activity. Ms. Kushindana testified that she knew that you were aware of her work as a travel agent as an outside activity because you once asked her to give you information on a trip to Disney World for you and your girlfriend, and you asked several times for her to do Internet searches for rates for hotel rooms when your friends were visiting New Orleans. Ten of your current and former subordinate employees (Patricia Bachemin, Kathy Barre, Lorri Clark, Kathleen Goss, Lisa Hawkins, Adimu Kushindana, Shirley LeBlanc, Julie Nguyen, Alger Taylor and JoAnn Thomas) testified that Ms. Nguyen's work on her outside activities was frequent, brazen, and that she worked nearly full time on her outside business activities. The overwhelming evidence provided by this testimony supports a finding that you either knew, or should have known of Ms. Myloc Nguyen's activities, and

should have taken appropriate management action. Your failure to take action renders you complicit in Ms. Nguyen's prohibited conduct. You acknowledged knowing of Ms. Kushindana's activities, but you also acknowledge doing nothing to ensure that she discontinued the activity. More seriously, you were complicit in Ms. Kushindana's violative behavior when you asked Ms. Kushindana, while you were both on Government time, to provide you information on a personal trip and lodging rates for your friends, knowing that Ms. Kushindana should not engage in such activity on Government time or equipment at any time.

Your excuse that you took no action with regard to Ms. Nguyen because the investigator instructed you to not discuss the investigation with anyone is unacceptable. You should have been concerned about this misconduct and discussed your concerns with either the investigator or me so that you could take appropriate management action. Your failure to take action renders you complicit in Ms. Nguyen's prohibited conduct.

You are therefore charged with Allowing Subordinate Employees to Conduct Private Business for Personal Gain Using Government Time and Equipment. Your deficient management in this regard is extremely serious and renders you unsuitable to continue to serve in a management position and/or a position of trust in this organization.

AF, Tab 13(4Q).

Myloc Nguyen testified that, when she began

working at the NFC in June 1999, she owned several businesses. She conceded that she performed work for her outside businesses while on government time and using government equipment including NFC's computer, facsimile machine, copier and telephone. She pointed out that the non-work-related documents found at AF, Tab 13(4E) at 738-1575 were found on her work computer or on her desk. She noted that the date and time stamps on the documents reflect that some of them were created on government time and others were prepared while she was on lunch break. Nguyen stated that the appellant was aware that she owned and operated outside businesses but she said he did not know that she performed work for those outside businesses on government time because she did not let him see her doing so. She added that she let her co-workers who worked near her (Kushindana, Jo Ann Thomas, Kathy Goss, Julie Nguyen, and Shirley LeBlanc) see what she was doing but not the appellant. Nguyen said she did not know if any of her co-workers told the appellant about her activities. She further related that before November 14, 2005, her desk was located on the other side of the EEOWSS area from the appellant's office. On November 14, 2005, when she returned to New Orleans after Hurricane Katrina, the appellant moved her to a cubicle right in front of Goss and Duvernay's offices and two doors down from the appellant's office. HT2 at 1A-2A.
Myloc Nguyen testified that White proposed to remove her from her position with the agency. She

identified HEXs S and T as responses she made to Lohfink regarding the allegations that she did so much personal business on government time that she did not get her government work done. Nguyen denied that anyone ever told her that it was inappropriate for her to perform work on her personal businesses on government time. She further related that, to her knowledge, she was the only one in EEOWSS to engage in such activities. She said she was not aware that Kushindana had an outside business. HT2 at 1A-2A.

Kushindana testified that the NFC issued an annual reminder to all its employees regarding doing personal work on government time. However, she said could not recall the appellant discussing that issue with his EEOWSS staff. She indicated that everyone in EEOWSS was aware that Myloc Nguyen was running her outside businesses on government time because she used the office facsimile machine and copier and sometimes counted money from her businesses at her desk. She recalled that, sometime after February 2005, she mentioned to the appellant that she felt that Myloc Nguyen was conducting her outside businesses on government time and that she gave the appellant examples of the evidence she had against Nguyen. She said she told the appellant that she was not the only one who was aware of Myloc Nguyen's activities. HT2 at 2A-4A.

Kushindana said she told the appellant about Myloc Nguyen because she was concerned about the proper functioning of the office. She explained that she would ask Nguyen for something and,

because Nguyen would be working on her outside businesses, she would question whether Kushindana needed it to be done right then. Kushindana remembered that, when she told the appellant about Myloc Nguyen, he seemed to get agitated and he mentioned that Nguyen is a good business woman. She stated that the appellant did not do anything about Nguyen because she continued to do her outside work on government time. HT2 at 2A-4A.

Kushindana testified that she also performed work on an outside business on government time. She explained that she worked for a friend/co-worker who operated a home-based travel agency. She related that she sometimes performed work for the travel agency using the government computer, telephone, and facsimile machine. Kushindana stated that the appellant was aware of her actions and that he did not seem to mind. She recalled that, on one occasion, the appellant asked her while they were at work to check the rates for Disney World for him right then.[38] She added that she did the research and gave him the quotes at work. Kushindana said she did not think her co-workers were aware of her actions because she tried to be discreet and she kept quiet about what she was doing. She stated that she and the appellant never had a discussion regarding her use of government equipment. HT2 at 2A-4A.

Shirley LeBlanc testified at the hearing that she worked for the appellant in EEOWSS as an EEO Counselor – Dispute Resolution for approximately seven years, until she retired on December 2, 2005.

She indicated that she was aware that Myloc Nguyen owned several businesses and that she received faxes related to those businesses on government time because she picked up faxes from the office facsimile for Nguyen on four or five occasions. She recalled that she also observed Nguyen using the office copier to make copies that were not related to her official duties. LeBlanc said that everyone in EEOWSS, including the appellant, knew that Myloc Nguyen was performing personal work on government time. She explained that the appellant was aware of "everything that was going on in the office." She conceded, however, that, in her November 15, 2005 affidavit,[39] she said she had no personal knowledge that the appellant was aware of Myloc Nguyen's activities and that she never mentioned Nguyen's conduct to him. She added, however, that she had heard from Kushindana that someone told the appellant about Myloc Nguyen. LeBlanc clarified that, in 2005, she and Myloc Nguyen sat "around the corner" from the appellant's office. She further related that, although her office was only 10 to 15 feet away from where Kushindana sat, she was unaware that Kushindana was performing work on an outside business while on government time. HT1 at 5A-5B. Kathleen Goss testified that she has worked in EEOWSS since July 2002. She indicated that she observed Myloc Nguyen perform work on her outside businesses while on government time and using government equipment. She said other employees picked up faxes off the office facsimile

machine for Nguyen that were for her businesses. Goss said she did not know whether the appellant ever picked up a fax for Myloc Nguyen but that Nguyen's receipt of non-work-related faxes was a common, day to day occurrence. She recalled that she and LeBlanc, Kushindana, and Jo Ann Thomas discussed Myloc Nguyen's activities amongst themselves but she did not report Nguyen's actions to anyone, including the appellant. Goss stated that she "assumed" the appellant knew what Nguyen was doing because she often talked about it while at work. HT1 at 5B-6A.

Goss testified that she was aware that the appellant selected her position to be separated by the RIF but she denied that she got angry with the appellant because of it.[40] She added that she had heard that the appellant was upset that she remained in EEOWSS and did not get RIFed.[41] Goss acknowledged that she wrote in her November 22, 2005 sworn statement that, when the appellant abolished her job, it made her vulnerable to the RIF.[42] She explained that, at the time, she was battling a potentially terminal illness and she was worried about her health insurance benefits but she insisted that she did not get angry with the appellant. Goss remembered telling LeBlanc that the appellant was trying to get her fired but she denied that it made her cry. She added that she spoke about her situation to many of her co-workers, including Thomas, LeBlanc, Bachemin and Julie Nguyen. HT1 at 5B-6A.

Jo Ann Thomas testified that, two or three times a

week, she retrieved faxes from the office facsimile machine for Myloc Nguyen that dealt with Nguyen's outside businesses. She remembered that the appellant told her that he admired Myloc Nguyen because she was hard working, a go-getter, and an entrepreneur. She acknowledged that she wrote in her August 26, 2005 sworn statement that the appellant "knows that Myloc Nguyen is using Government equipment and time to work on her business and has said, 'It is OK. She's an entrepreneur and a go-getter.'"[43] She explained, however, that this was an oversight on her part and that she should have corrected this part of her statement. She testified that she and the appellant never discussed Myloc Nguyen conducting her outside business on government time and that she did not mean to imply in her statement that the appellant knew about Nguyen's actions in the office. She said the appellant had merely mentioned that he admired Myloc Nguyen because she was a go-getter and an entrepreneur. Thomas added that Kushindana told her and LeBlanc that she complained to the appellant about Myloc Nguyen's actions. HT1 at 7A-7B.

Thuy Thu Nguyen testified that she was aware that Myloc Nguyen performed work on her outside businesses on government time because Myloc Nguyen mentioned it to her co-workers and she also overheard her on the government telephone. She added, however, that she did not know if the appellant was present when Myloc Nguyen talked about her outside businesses. HT1 at 8A.

Kathy Polk Barre testified that she worked for the appellant in EEOWSS from October 1997 until December 2003, when she took the position at the NFC of Executive Director for the New Orleans Federal Executive Board. She had occupied several positions with EEOWSS and/or the Morale Improvement Staff: Management Analyst, Conflict Management Specialist, and Conflict Prevention Specialist. Barre recalled that Myloc Nguyen used government time and equipment to conduct her outside businesses. She explained that Nguyen's desk was in an open/common area and, therefore, what she did was visible to passersby. She said she personally observed Nguyen performing work on her outside businesses numerous times. HT1 at 8A-8B.

Barre indicated that she thought the appellant was aware that Myloc Nguyen was working on her businesses on government time because Nguyen openly talked about her outside businesses and the appellant commented to Barre about Nguyen's business savvy and ingenuity. She also pointed out that Myloc Nguyen often left documents related to her outside businesses on her desk, the facsimile machine, and/or the copier and Nguyen openly talked on the telephone and used her government computer for her outside businesses. Moreover, she said that Myloc Nguyen's conduct was a "well known fact" and she overheard other employees complaining about it in the office. Barre conceded, however, that she had no first hand knowledge that the appellant was aware of what Myloc Nguyen was

doing on government time and equipment and he never told her that he knew. Barre further related that, although she thought Myloc Nguyen's actions were inappropriate, she never said anything to the appellant about Nguyen. HT1 at 8A-8B.

Barre acknowledged that she was hurt when she left EEOWSS to take a new position. She explained that she had always been interested in that position but it was the manner in which her reassignment occurred that hurt her. She indicated that the appellant left a note on her door saying that he would meet with her and, although she waited for him to meet with her, he never did. She said she avoided speaking to the appellant face to face for about two years after her reassignment. HT1 at 8A-8B.

Julie Nguyen testified that the appellant allowed Myloc Nguyen to run her outside businesses while at work, on government time. She recalled that, two or three times a day, she heard Myloc Nguyen talking on the telephone regarding her personal businesses. She also remembered that, two or three times a week, faxes came in on the EEOWSS facsimile machine that were for Myloc Nguyen's businesses and that she would put those faxes on Nguyen's desk. Julie Nguyen said the appellant had discussions with Myloc Nguyen at work about her businesses. HT1 at 2A-5A.

Duvernay, who testified at the appellant's request, indicated that, after 2001, Myloc Nguyen worked right outside her office and that she never saw Nguyen doing personal work on government time. She said she wrote a letter on Nguyen's behalf

when the NFC was proposing to discipline her. She opined that she did not know when Nguyen would have had time to do work on her outside businesses because she had so much official work to perform and she kept up with her EEOWSS duties. HT1 at 11A-11B.

The appellant testified that he was aware that Myloc Nguyen owned outside businesses but that he did not know that she was performing work on those businesses on government time, using government equipment. He pointed out that, although many of his employees apparently were aware of Nguyen's actions, none of them told him anything about Nguyen until sometime between May and July 2005, when Kushindana informed him about Myloc Nguyen's activities. Although the appellant suggested that this happened after Vengazo began her investigation he later testified that it was before he was aware that he was being investigated. He said that Kushindana told him that Nguyen was doing work for her businesses on government time at the same time that she told him that he could expect trouble if Julie Nguyen was impacted by the RIF and not Myloc Nguyen. The appellant added that he "would not engage" Kushindana because she was "out of line" coming to him about the decisions he had made regarding the RIF. HT2 at 7B-11B.

The appellant asserted that, after Kushindana informed him of Myloc Nguyen's alleged misconduct, he began to watch Nguyen more closely by walking by her desk more often. He said he decided not to ask Nguyen about Kushindana's

accusations because he wanted to see for himself what Nguyen was doing. The appellant explained that he believed Kushindana had "an agenda" when she came to him about Myloc Nguyen. Therefore, he said he thought it would be best if he obtained independent evidence regarding Nguyen. He added that Myloc Nguyen was at her desk each time he walked by and he failed to see her doing anything of a personal nature. He recalled that shortly thereafter Myloc Nguyen went on vacation to Vietnam for 30 days and then Hurricane Katrina hit and his employees were relocated to other sites. The appellant related that, when the EEOWSS staff returned to New Orleans on November 14, 2005, he moved Myloc Nguyen's desk closer to his office so he could observe her actions. The appellant denied that he ever knowingly handed Nguyen a fax that was not job related. He claimed that he avoids reading other peoples' faxes. HT2 at 7B-11B.

As to Kushindana, the appellant admitted that he knew that she worked for a travel agency that was owned by a co-worker, Juanita Daniels. He remembered that he frequently saw Daniels in Kushindana's office but he said he did not think anything of it because he knew they were friends. He recalled that, approximately two years before Kushindana transferred into EEOWSS, Kushindana's supervisor, Jules Lamont, asked him for advice because Lamont suspected that she was doing travel agency work on government time. The appellant stated that he advised Lamont about what to do and that, because Lamont never

mentioned it again, he thought the matter was resolved. The appellant related that, during Vengazo's second interview, he learned that Kushindana had been performing duties for her private business at work. He said he then remembered that Kushindana was in the travel business. The appellant denied that Kushindana ever booked a flight or trip for him and he insisted that he had no knowledge of her doing travel agency work on government time while she worked in EEOWSS.[44] The appellant asserted that both Myloc Nguyen and Kushindana had managed to keep what they were doing hidden from him. HT2 at 7B-11B.

The appellant indicated that Vengazo told him to stay away from the employees who were making allegations against him to avoid retaliation accusations. He added that he believed Vengazo had some authority because of the authoritative manner in which she told him what he could and could not do. The appellant opined that he felt he could not do anything about Kushindana while the investigation was going on and, therefore, he did not report Kushindana to his supervisors while he was waiting for Vengazo to get back with him. Soon, thereafter, Hurricane Katrina struck New Orleans and his employees were disbursed to other locations until November 2005. Then on March 28, 2006, the agency proposed his removal and placed him in a paid, non-duty status. HT2 at 7B-11B.

In his January 19, 2006 sworn statement, the appellant wrote the following in relevant part:

Between the time of my first interview for this investigation
(August 19, 2005) and the time of my second interview (December 5, 2005), I have not spoken to Myloc to ensure that she has ceased working on her outside business on NFC equipment and time. I did not discuss the matter with Myloc because I was instructed by the investigator not to discuss the investigation with any other employee. In addition, I have only been with my subordinate staff on a limited number of occasions since August 19 2005, due to my attendance at an EEO conference and Hurricane Katrina. Since the hurricane, I have been working in Alexandria, Louisiana. My staff was activated to return to work at NFC [in New Orleans] on November 14, 2005, but I have continued to work at the alternate site in Alexandria. . . .
On November 14, 2005, I moved Myloc to work closer to my office in order to increase my ability to observe her activities more closely in the future. . . . The investigator told me during the interrogation that a considerable volume of documents related to Myloc Nguyen's outside business interest was found on the hard drive of the NFC computer assigned to her. The investigator said the hard drive was copied for the investigation. . . . The investigator told me that Myloc admitted to extensive use of Government time and equipment for her outside business that the investigator described as for profit. When the documents are provided, I will review the documents and assess how serious her alleged inappropriate activities

have been and determine what corrective action may be warranted considering all relevant circumstances.
AF, Tab 13(4E) at 515-16.
It is undisputed that Myloc Nguyen owned and operated several outside businesses, including a convenience store/gas station, while she was employed in EEOWSS. It is also unquestioned that Myloc Nguyen used government time and equipment (computers, software, copiers, printers, facsimile machines, and telephones) to work on activities related to her outside businesses. Based on her actions, John White issued a notice proposing to remove her from her position. Lohfink subsequently mitigated the penalty to a 14-day suspension. HT2 at 1A-2A. It is also not in dispute that Kushindana used government time and equipment to perform work for a travel agency business. HT2 at 2A-4A. Consequently, the issue here is when and if the appellant knew about Myloc Nguyen and/or Kushindana's misconduct and did he allow it to happen.
The appellant's employees LeBlanc, Barre, Kushindana, Thomas, Goss, and Thuy Thu Nguyen all testified that it was common knowledge in the office that Myloc Nguyen performed work for her outside businesses on government time. In light of this, as well as the amount of work performed by Myloc Nguyen on government time as evidence by the almost 800 pages of non-work-related documents found on her hard drive and in her work area, I find it to be inherently improbable that the appellant was as clueless about Myloc

Nguyen's activities as he would have the Board believe. I also find it unbelievable that the appellant would retrieve faxes from his office's official facsimile machine and not ascertain at least generally the nature of their content. Furthermore, the appellant conceded that sometime between May and July 2005, and before he learned that he was being investigated, Kushindana informed him about Myloc Nguyen's actions. He claimed, however, that he was skeptical of Kushindana's information because of the manner and timing with which she provided it to him. Nevertheless, I find that the appellant was put on notice that one of his employees may have been engaging in misconduct and that he failed to do anything about it. Moreover, his assertion that he did not speak to Myloc Nguyen after Vengazo's August 19, 2005 interview, because Vengazo admonished him not to discuss the matter, does not explain why he did nothing prior to August 19, 2005 except try to catch Myloc Nguyen in the act. He could easily have questioned Myloc Nguyen about Kushindana's allegation and/or had her hard drive analyzed which would have revealed hundreds of pages of non-work-related documents. The record further reflects that Myloc Nguyen's non-work-related activities continued into August 2005. *See, e.g.*, AF, Tab 13(4E) at 893, 1016-17, 1019-20.

Hence, after considering the entire record and the appellant's lack of credibility, I find that the agency has established that by failing to take any action whatsoever to curtail Myloc Nguyen's

conduct, the appellant allowed Myloc Nguyen's misconduct to continue. Accordingly, Specification A is sustained.

As to Specification B, Kushindana testified that she provided the appellant rates for Disney World on government time. She also stated essentially the same information in her January 30, 2006 affidavit. The appellant, who was present when Kushindana testified and was provided copies of Kushindana's statements, denied at the hearing that Kushindana ever booked a flight and/or trip for him to Disney World but he never mentioned or denied that she provided him rates. On the other hand, Kushindana never said she booked a flight or trip for him to Disney World. Moreover, I find that Kushindana testified in a clear, concise and unequivocal manner and that her overall demeanor demonstrated trustworthiness. On the other hand, as was discussed above, I have found that the appellant lacked credibility. I, therefore, credit Kushindana's testimony on this issue over that of the appellant. Accordingly, I find that the agency has demonstrated that it is more likely true than untrue that the appellant allowed Kushindana to perform work for an outside business on government time. Consequently, Specification B is sustained. Thus, Charge III is proven.

The agency has proven that the appellant directed subordinate employees to perform personal work for him on government time and equipment.

The March 28, 2006 notice of proposed removal cited two factual specifications to support Charge

IV. See AF, Tab 13(4Q). The deciding official, however, sustained only Specification B.[45] See AF, Tab 13(4D). The proposal notice stated the following in relevant part:

The investigation found several situations where you required your subordinate employees to perform personal work for you on Government time and equipment. . . .

Specification B.

5 CFR, Part 2635, Subpart G, Section B, Misuse of Government Time, Equipment, and Information (excerpt attached as Exhibit 6), states in part,

"1. GOVERNMENT TIME, YOU MAY NOT:

Use official time other than in an honest effort to perform official duties.

Encourage, direct, coerce, or request a subordinate to use official time to perform activities other than those required in the performance of official duties. . .

5. GOVERNMENT EQUIPMENT AND PROPERTY, YOU MAY NOT:

. . . Use government equipment for personal use, except for reasonable limited non-commercial use which does not interfere with official duties and involves minimal office expense ...."

You have acknowledged in your sworn testimony (Affidavit dated January 19, 2006) that, "Over the period of many years, on a very infrequent basis, I have asked students, and possibly on rare occasions others, to type a personal document for me. Almost all of the personal documents were short, some only one sentence. All of the documents would have already been handwritten

and prepared by me during my own time."[46] Documents found on EEOWSS computers and provided by witnesses interviewed revealed an extensive and wide variety of personal correspondence prepared for you by your subordinate staff, i.e., Lorri Clark, Adimu Kushindana, Thanh Thuy Nguyen and Thuy Thu Nguyen, on Government time and equipment.[47] These documents span the period from 1999 to August of 2005 and include personal letters to family members, letters to banks, fax transmission documents (using NFC form, address, telephone and fax numbers) to your bank, bills of sale for real estate for you and other parties, agreements for sale of real estate property, requests for occupational license application, character references for people facing criminal sentencing, letters to attorneys, applications for graduate school for your son, and school papers for your son. One employee, Thuy Thu Nguyen, testified that you asked her to research and write a paper for your son. Ms. Nguyen said that you allowed her to work on this project on Government time.[48] Your testimony regarding the above allegations reflects poorly on you as a manager and an employee. With the length of your experience as a labor relations specialist, human resources and an EEO manager, in particular, you knew or should have known that it is highly inappropriate for a supervisor to ask a subordinate employee to do a personal favor for him and presume that the employee will consider this a request from a "coworker" rather than an order from a supervisor.

. . .

> Your responses about the use of your subordinate staff and Government equipment and time for your personal correspondence reflect poorly on you as a manager. . . .
>
> The USDA Limited Use Policy[42] . . . specifies that use of Government equipment is prohibited for "purposes of private businesses." 5 CFR 2635 cited above clearly prohibits the use of subordinate staff to work on personal business on Government time and equipment. By allowing subordinate staff to work on outside business activities for personal gain on Government time and equipment and by directing subordinate staff to work on your personal correspondence on Government time and equipment, you were seriously derelict in fulfilling your management responsibilities and in your personal compliance with statutory and regulatory requirements.

You are therefore charged with Directing Subordinate Employees to Perform Personal Work . . . for You on Government Time and Equipment. AF, Tab 13(4Q) (emphasis in original).

At the hearing, Thuy Thu Nguyen testified that she was employed by the NFC in EEOWSS, from 1999 through 2003, as a Clerk-Typist pursuant to the Student Temporary Employment Program. She indicated that, as a student, she worked mostly on a part-time basis but that she worked full time during school breaks. She remembered that the

appellant was her supervisor and that her official duties included filing, answering the telephone, and typing correspondence. Thuy Thu Nguyen recalled that, on one occasion, she did research for, wrote, and typed a research paper for the appellant's son regarding how the news media affects African-American culture. She related that she spent between three and five hours doing research for the paper on the internet using her government computer. She added that some of the research was done when she was on a break at work but that she also did research for the paper when she was not on a break. She indicated that, except for a sentence here and there, the document found at AF, Tab 13(4E) at 1640-41, was the paper she wrote for the appellant's son. HT1 at 8A.

Thuy Thu Nguyen recalled that she also performed other non-work-related tasks for the appellant while she was "at work" such as making personal copies using the government copy machine and researching graduate school programs for the appellant's son. She conceded that the appellant never threatened to fire her if she did not do these personal things for him nor did he coerce her in any way into performing these non-work-related duties. HT1 at 8A; *see also* AF, Tab 13(4E) at 700-01 for Thuy Thu Nguyen's November 8, 2005 affidavit.

Adimu Kushindana testified that, on three or four occasions, the appellant asked her to type up paperwork for him regarding real estate he was interested in purchasing. She identified the

documents found at AF, Tab 13(4E) at 493-96 as things she typed for the appellant. She explained that the appellant would call her to his office and he would give her a handwritten draft and ask her to type it for him. She recalled that the appellant's requests were made during working hours and that, even if she told him she was busy, he would tell her to type up his personal document right then. Kushindana indicated that the appellant never told her that she did not need to do these tasks for him. She added that, after she typed the document using her government computer, she would return both the typed copy and the handwritten draft to the appellant. HT2 at 2A; *see also* AF, Tab 13(4E) at 488 for Kushindana's December 8, 2005 affidavit.

Julie Nguyen related that, at the appellant's request and while on government time using a government computer, she typed the January 2, 2004 letter to a bank found at AF, Tab 13(4E) at 1613,. She explained that the appellant gave her a handwritten note and he asked her to type it for him. Nguyen recalled that the appellant never said she could tell him "no." Rather, she felt she could not say "no" to the appellant. She indicated that if you did not abide by the appellant's rules, he would give you a hard time. HT2 at 2B.

Lorri Clark, the appellant's secretary, averred in a December 7, 2005 affidavit that the appellant asked her to "type personal correspondence for him, for example, letters to banks and a building company." AF, Tab 13(4E) at 348. She provided copies of five documents she said she typed for

the appellant. See *id.* at 351-55. These documents were dated between November 1, 2001 and April 11, 2005. *Id.*

At the hearing, the appellant acknowledged that his subordinate employees, including student employees, occasionally did personal work for him but he stated that he never "directed" an employee to perform personal work for him on government time and equipment. He conceded that student employee Thuy Thu Nguyen wrote a research paper for his son. He indicated that Thuy Thu Nguyen wrote some of the research paper and that he edited her work and wrote some of the paper himself. He testified that he never directed or coerced Thuy Thu Nguyen into writing the paper for him but that he merely asked her if she would mind doing it for him. He added that he never told her to work on the paper during work hours. The appellant recalled that he had a very cordial relationship with the student employees, such as Thuy Thu Nguyen, and that he believed they knew they could tell him "no." The appellant related that his son did not know anything about the paper and did not perform any work on the paper. He stated that he personally submitted Thuy Thu Nguyen's research paper to various universities as his son's writing sample for admission to a PhD program. As to the documents prepared by Kushindana, the appellant related that he was trying to clear up a real estate issue of a "family-related nature." He claimed that the task commemorated by the document found at AF, Tab 13(4E) at 1647 was work related and was not

personal in nature. HT2 at 7B-11B.

In his November 14, 2005 deposition, the appellant stated the following in pertinent part:

I never directed anybody to do anything for me. I did ask the students to do some short typing for me something that I had already - - - had written. And it was principally two students, Thanh-Thuy Nguyen and Hanh Nguyen.[50] So I asked them. . . . [In their statements] they say I never directed them to do anything, that indeed they came to me on occasions and asked me if I had something they could do.[51]

And also they said - - one of them for sure . . . spoke of the short duration of it and perhaps it was during their break time when they would have done it for me. . . .

So I did not direct them and I did not require them, either one of the ones that we want to use, to do it for me. They gladly did it for me. And if they made any indication whatsoever they didn't want to do it, they wouldn't.

Next, it was such a small amount. . . . If you look at total typewritten pages maybe three, three and a half pages a year for the time period this would average out that was there. . . . So if you use the word typed-on pages it would come out to about six for the time period a year, meaning it may have one word on it but yet you would count it as a page. But if you looked at actual pages it come out to around three pages, three and a half pages a year. . . .

None of them was for any profit. I got nothing out of any of them.

They was various things . . . I have a son and I was interested . . .
I was trying to help him out, make sure that he got into a Ph.D graduate school program.
So I would do some things myself, looking into to try to help him and some of them was for that.
Some of them were very short things just for myself.
. . .
Another thing, at some point during that time period my mother deceased and I - - you see two letters. I wrote my cousins about thanking them for their - - they had put on a family reunion. . . .
I began to try to some control factors in reference to the things left behind - - my mother was the last to decease . . . so not having any parents . . .I was trying to make sure we keep the property under some kind of control. So I started with one of my brothers who had no interest . . . in the property.
My son never did go to one of the schools that I wrote. He made a decision to go somewhere else.
And other things was just very little minor. Some of them one line, one sentence or something.
[In response to why he did not type these documents himself the appellant said] I guess I have to admit, very poor computer skills.
[Concerning permanent employees, the appellant said] it was very de minimus and one of a kind or something like that. . . .
But I don't know of anyone -- if I did I don't know of anybody, period, ever letting me know that they would not have wanted to type something for me. Any indications whatsoever. Because if they would have made any kind -- through facial expression or

any other kind of expression or words I would not have asked them. So I don't know of anything I would have wanted anybody to type that was life or death that I would have needed anyway. So if somebody would have given me any indication whatsoever that they didn't want to type something for me, I wouldn't want them to type it for me.

HEX 1, Vol.1 of the appellant's deposition, pages 79-80, 82-86, 93-94 (grammar as in original). The appellant said he never told any of his employees that they should type his documents on their personal time but he added that some of them informed him they had done his typing on their own personal time. *Id.* at 94-96.

After considering the record in its entirety, including the appellant's responses to the notice of proposed removal, his deposition, and his hearing testimony, I find unpersuasive the appellant's assertion that he did not "direct" employees to do his personal typing but that he merely asked them to do it. Moreover, I find disingenuous his argument that none of the employees ever told him they did not want to do his personal typing. I find especially egregious his use of the student employees, Thuy Thu Nguyen, Thanh-Thuy Nguyen, and Hanh Nguyen, to do his personal work since it would be highly unlikely that these young students would ever have said "no" when their supervisor asked them to perform a task.

The nature of a charge should be construed in light of the accompanying specifications and

circumstances. *Langham v. U.S. Postal Service*, 92 M.S.P.R. 268, ¶ 12 (2002). Furthermore, the agency's burden is to present sufficient evidence to convince the trier of fact that the substance of its charge is more likely true than untrue. *Raines v. U.S. Postal Service*, 32 M.S.P.R. 56, 58 (1986). In light of the language cited by the agency, as well as the circumstances of this case, including the relationship between the appellant and the employees at issue, I find that the agency has met its burden of establishing that the appellant engaged in the misconduct cited in Specification B of Charge IV. Therefore, Charge IV is sustained.

The agency has proven that the appellant engaged in inappropriate management and personal conduct.

Charge VII of the March 28, 2006 proposal notice stated:

Your subordinate employees testified under oath that you have acted inappropriately, you yell and embarrass them, and you make inappropriate remarks and tell inappropriate jokes in their presence. The employees testified that you often humiliate them with your loud and condescending behavior toward them.

Specification A.

Julie Nguyen testified that, on January 15, 2005, you grabbed her upper arm with your hand and squeezed it very hard. Ms. Nguyen told you to stop, and said that you were hurting her, you [sic] but you held onto her and seemed to assume she was joking with you. Ms. Nguyen eventually stomped on your foot to secure the release of her arm.

Patricia Bachemin, Lorri Clark, Adimu Kushindana, Shirley LeBlanc and JoAnn Thomas witnessed this incident. Ms. Kushindana testified that she said to you, "I think Julie is hurt and you need to let go of her arm." After you released Ms. Nguyen's arm it was bruised.

Ms. Nguyen said that this is not the first time that you had grabbed her arm this way. She testified that you had done it approximately three other times.

This is unacceptable conduct for a Federal manager, and, as the NFC's equal employment opportunity manager, you should have known this.

Specification B.

Current and former employees of the EEOWSS testified that you make inappropriate remarks and tell and participate in jokes that are inappropriate. Patricia Bachemin, Kathy Barre, Kathleen Goss, Lisa Hawkins, Adimu Kushindana, Shirley LeBlanc, and Julie Nguyen testified that your remarks and jokes make fun of homosexuals, overweight people, and religions as well as the religious beliefs of staff members and others. Employees also testified that you engage in name calling, using such terms as "mother fucker," "fat ass," and "bastard." Kathy Barre, JoAnn Thomas, and Thuy Thu Nguyen testified that your jokes are often inappropriate, offensive, insulting, mean and humiliating. . . .

Specification C.

Several of your current and former subordinate employees, namely Lorri Clark and Julie Nguyen, testified that you occasionally pound your fist loudly on your desk, or on other employees' desks,

when you are upset about something. The employees testified that this gesture frightens and intimidates them and makes them fearful of you and your temper. They testified that these gestures also embarrass them when you do this while visitors are in the office who can witness or overhear your actions. . . .

Specification D.

Several of your current and former employees testified that you have been so harsh in your private and public criticism of employees that you have humiliated and caused them to cry. Patricia Bachemin, Kathleen Goss, Shirley LeBlanc, Julie Nguyen and Thuy Thu Nguyen all testified that your actions caused them to cry or that they witnessed your actions causing other employees to cry. . .

In your Affidavit dated January 19, 2006, you testified, "Within the office environment, I remain in my office most of the time. On occasion, I will walk around the office, speak, and make light conversation with employees. To the extent possible, one of my goals is to make all of the employees feel that they are part of the office. . . I have never intentionally embarrassed any employee on my staff. I engage in light conversation with employees."

The examples of unacceptable conduct cited above are illustrative of your deficient conduct as reported in extensive testimony by your current and former subordinate employees. The actions described created a hostile work environment for EEOWSS employees that is prohibited by the policies, regulations and statutes cited and

referenced above, and are unacceptable for a Federal employee of any grade and seniority, but they are especially egregious for a GS-14 level program manager, and most serious for the director of the NFC's equal employment opportunity program.
AF, Tab 13(4Q).
Former EEO Counselor Shirley LeBlanc testified at the hearing that she heard the appellant make inappropriate comments and gestures regarding people being overweight. She recalled that the appellant made comments about a woman named Kitty Abrams, after Abrams got stuck in a chair because she was too large for the chair. LeBlanc further related that a group photograph was taken of all the EEO Specialists and that she thought the picture was unflattering to her. She recalled that she asked the appellant to have another picture taken and that he said "no" and commented something to the effect of "everybody can see who's out in front at EEO," Shirley LeBlanc, "standing strong," while he made a rounding gesture with his hands. LeBlanc stated that she felt the appellant's comment and gesture were directed at her weight but, although her feelings were hurt, she did not tell the appellant. She said she asked him twice to take another photo and he would not do it. LeBlanc added that she would sometimes have to tell the appellant "I'm not talking about fat people today." She acknowledged that she did not mention in her November 15, 2005 affidavit[52] the incident with Abrams or that the appellant made a gesture

when he commented about the group photograph. HT1 at 5A-5B.

LeBlanc indicated that the appellant never used any profane language in her presence because she had asked him not to do so. However, she said she had heard from other EEOWSS employees that he had used vulgar language with them. For example, Julie Nguyen told her and Jo Ann Thomas that the appellant told her to tell Jo Ann Thomas to get her "fat ass" into his office. She also recalled that Jo Ann Thomas said she heard the appellant say "Mother Fucker" in the office. She conceded that she did not mention the "mother fucker" or "fat ass" allegations in her November 15, 2005 sworn statement.[53] HT1 at 5A-5B.

LeBlanc testified that the environment in the EEOWSS office was often strained because the appellant made employees cry and get upset because of things he did or said. She added that, if the employees perceived that the appellant was angry, they would not come out of their offices. She recalled that she observed Clark crying after the appellant "chewed her out." LeBlanc indicated that she saw Julie Nguyen crying in her cubicle after the appellant "got on her case." On another occasion, Goss came into LeBlanc's office and was upset and crying because she said "our boss is trying to get me fired." LeBlanc added that there were times when the appellant showed sensitivity, such as when one of their office assistants had cancer. She said she did not recall the appellant grabbing Julie Nguyen's arm. HT1 at 5A-5B.

In her November 15, 2005 sworn statement, LeBlanc averred the following in relevant part:

I have heard Mr. Lewis make inappropriate jokes and teasing remarks in the office that are hurtful to employees . . . For example, he has criticized me in front of my coworkers about my weight. I mentioned something to Mr. Lewis about my not liking office luncheons because of comments he made about weight, for example, making references to "big people." He also teased me about how my size appeared in a picture of the EEO Counseling Specialists. These comments about my weight are embarrassing to me and to the others in the office whom he teases about their weight. . . .

I recall one occasion, on February 23, 2005, when I could hear Mr. Lewis' loud voice and later learned that it was Julie Nguyen that he was talking to. While I could not hear what he said, I was concerned. When Julie left Mr. Lewis' office, I recall asking her if she was OK because I could see that she had been crying. . . .

On August 18, 2005, Kathy Goss came to my office, near tears, and said, "My boss is trying to set me up." I asked what she meant. She said, "He gave me three cases and he knows I'll be out for my Chemo beginning next Tuesday."

AF, Tab 13(4E) at 507-08.

Kathleen Goss testified at the hearing that she overheard the appellant poking fun at religious activities and pastors. She recalled that the appellant made on-going comments about a church he was going to start and that he would

then be "raking in the money." She added that he said he was going to appoint one of the student workers to handle the money. Goss remembered that the appellant also mocked some of the EEO complainants that they dealt with. For example, she related that the appellant said he wanted to get this "mother fucker and his bull shit" out of this place about one of the complainants she was working with. Goss could not recall the date this occurred and she said there were no other witnesses to this event because she and the appellant were alone in his office at the time. Goss pointed out that in her November 22, 2005 sworn statement she stated that the appellant "also inappropriately uses profanity in the office, using such terms as 'mother fucker' and 'fat ass.'"[54] She added that the appellant made these comments sometime in late Spring of 2005, because at the time she was preparing to be out of the office for a week to undergo treatment. HT1 at 5B-6A.

Goss further related that the appellant did not like fat people and that she heard him warn employees not to get fat. Goss testified that the office environment was clouded with fear and dread. She said the employees were anxious regarding the mood the appellant might be in and who he might target on any particular day. She added that she witnessed employees crying and upset after the appellant talked to them. Goss remembered telling LeBlanc that the appellant was trying to get her fired but she denied that she cried. HT1 at 5B-6A.

In her November 22, 2005 affidavit, Goss related

the following in relevant part:
[The appellant's] weaknesses are his very poor social and communication skills . . . He is sometimes fair, and sometimes extremely biased. He also often uses teasing inappropriately. . . .
Mr. Lewis often puts employees into an emotional state with harsh criticism, e.g., crying to the extent that the employee may have to go home. An employee's tears have no affect on him. . . .
Mr. Lewis is not fair to employees; he humiliates employees and many have actually cried. . . . He behaves inappropriately with young female students. He teases as a way of interacting with people; for example, he jokes about religion. . . . He makes jokes about preachers and churches collecting money and tells people he has established a new church. He gives the fictitious name of it and tells different ones they can be his accountants or helpers as he collects the wealth.
AF, Tab 13(4E) at 427-28.
EEO Counselor Jo Ann Thomas related that the appellant sometimes told jokes that were sexual in nature or that had a sexual connotation but she said his jokes were not sexually explicit. She could not, however, remember any specifics about the appellant's jokes and she clarified that the appellant never made any egregious or vulgar jokes in her presence. She further recalled that the appellant would often shout when he got angry. She explained that, when the appellant was in a bad mood, he would not speak and would have a scowl on his face. Thomas added that she did not want to deal with the appellant when he was in

one of his moods and, therefore, she would avoid his side of the office. Thomas recalled that, on one occasion, she was counseling an NFC employee in her office with the door closed and she and the employee could hear the appellant yelling in a very loud voice. She said the employee asked her what was happening and she told him to leave. . . Thereafter, she went to the appellant and told him that he needed to calm down. HT1 at 7A-7B. Thomas testified that the appellant assigned her to train Julie Nguyen when Nguyen started in EEOWSS. She related that Julie Nguyen was afraid of the appellant and, several times, Nguyen came to her office very upset. She said Nguyen wanted her to act as a buffer between her and the appellant and begged her to go to the appellant to ask for instructions on a project that the appellant had assigned to Nguyen. She recalled that sometimes Nguyen did not understand what the appellant wanted her to do and if she asked the appellant to repeat his instructions, he would make her feel stupid. Hence, Thomas said, at Nguyen's request, she would either go alone or with Nguyen to get further clarification from the appellant regarding what he wanted Nguyen to do. She indicated that sometimes she would have to repeat the appellant's instructions to Nguyen until she finally understood. Thomas related that she never observed Nguyen refuse to comply with any of the appellant's instructions. She confirmed that she wrote in her August 26, 2005 sworn statement that the appellant "frequently screams at" and "belittles and humiliates" Julie Nguyen.[55]

She explained that the appellant shouted and yelled during most of his interactions with Nguyen and that he did so in front of other employees. HT1 at 7A-7B.

Thomas further described the work conditions in EEOWSS in 2005, as a "hostile work environment." She related that at times she as well as most of the EEOWSS staff were afraid of the appellant. She said she tried to avoid making the appellant angry for fear that he would begin to treat her the way he treated Julie Nguyen. She emphasized, however, that although the appellant sometimes yelled at her, she did not allow anyone to disrespect her and, therefore, the appellant did not interact with her to the same extent as he did with Julie Nguyen. Thomas added that, because she had been assigned to train Julie Nguyen, she observed first hand the appellant's treatment of Nguyen and, on several occasions, she spoke to the appellant about how he behaved towards her. She indicated that, to her knowledge, the appellant did not give Julie Nguyen unfair performance appraisals. HT1 at 7A-7B.

Thomas also clarified that, although she wrote in her August 26, 2005 affidavit that the appellant was "very vindictive,"[56] she did not know of any specific examples where he was vindictive and that he never retaliated against her. She conceded that the appellant has a naturally loud voice but she added that his voice escalates even more when he gets angry. Thomas recalled that, on one occasion when she went with Julie Nguyen to see the appellant, he was extremely abrasive

and loud with Nguyen. She said she stayed behind after Nguyen left and she told the appellant that he was too hard on Nguyen. She noted that this occurred before the T.L. incident. After Thomas spoke to the appellant about how he treated Julie Nguyen, she said he seemed to behave better towards her. She added that Nguyen even thanked her for speaking to the appellant since she felt he was treating her a little better. Thomas further related, however, that the appellant's belittling of Julie Nguyen began happening again after that. Thomas said she never saw the appellant pound his fist on a desk or grab Julie Nguyen's arm. HT1 at 7A-7B.

Kathy Polk Barre testified that she heard the appellant joking about women's weight and anatomy. She explained that the appellant joked in particular about women he supervised or who worked at the NFC, including EEO complainants, having big hips and butts and being out of shape. Barre recalled that LeBlanc told her that she was hurt by comments the appellant made regarding a group photograph. She indicated that the appellant's remarks made LeBlanc's eyes well up and that they upset her as well. Barre added that the appellant's comments regarding weight occurred on a recurring basis and were "at times, unbearable." She related that she worked hard not to let the appellant offend her but that his remarks were often "highly offensive," especially in light of his position and the job he was supposed to perform. HT1 at 8A-8B.

Barre testified that the appellant also made

comments about religion that he apparently thought were funny. She said he talked about pastors and the money they made and the cars they drove. She recalled that he was constantly putting down people who tithed and gave money to churches. Barre remembered that on one occasion the appellant said he was "God" and that she found this to be extremely offensive. She added that, when the appellant made that statement, she told him she was leaving because she did not want to be struck by lightening. HT1 at 8A-8B.

Barre further related that the appellant also made inappropriate remarks about homosexuals. She indicated that, on one occasion, when an EEO complainant who was perceived as being a homosexual left her office, the appellant pulled out some hand sanitizer and made a show of using it. She stated that she felt the appellant's comments and conduct were offensive in light of the work EEOWSS performed, which was to assist individuals with their problems. Barre added that, at times, she felt the environment in EEOWSS was abusive. HT1 at 8A-8B.

Barre conceded that everything she testified about at the hearing was not included in her December 7, 2005 sworn statement,[57] such as her story about the hand sanitizer. She explained that everything was not recorded in her final signed affidavit but that she considered her statement to be complete for the purpose for which it was drafted and she really did not expect that it would contain every single thing she said. Barre noted

that, because of Hurricane Katrina, several months passed between when she was interviewed and when she was asked to review and sign her statement. She said that, at that time, it was not a priority for her to add more information and that she did not feel she had time to do so. Barre also related that, on occasion, she told the appellant that certain comments were offensive but she never told him that the homosexual incident bothered her. She said she informed him that the "God" comment was inappropriate since she told him she was leaving the area because she felt there could be ramifications. Barre pointed out that some employees were "in" with the appellant and others were not. HT1 at 8A-8B.

Barre acknowledged that when she was reassigned from her Conflict Management Specialist position to the Conflict Prevention Specialist position, a job she had always been interested in, she was hurt and disappointed by the manner in which the appellant reassigned her. She indicated that the appellant left a note on her door saying that she was being reassigned and that he would meet with her about it. She related that, although she waited for him to meet with her, he never did. She said that she avoided speaking to the appellant face to face for about two years after that. Barre noted that when she left EEOWSS in December 2003, her feelings were still hurt. HT1 at 8A-8B.

Kushindana indicated that the appellant was known to use inappropriate language and that he spoke in a loud voice, which was disruptive in the

office. She related that the appellant used the phrase "fat ass" frequently to refer to Jo Ann Thomas and that, specifically on one occasion, she heard him say, "Tell Jo to get her fat ass in here." She added that the appellant did not care for the Deputy Director, John White, and referred to him as a "dumb son of a bitch" and "mother fucker." Kushindana testified that, although the appellant's language disturbed her, she never directly informed him of that because he intimidated her and she did not want to "get into it" with him. Kushindana further related that the appellant criticized her religious beliefs. She explained that she was raised Catholic but attended a Pentecostal church. She said the appellant commented that she was not worshipping a real god, which made her cry. She indicated that she told the appellant that she did not appreciate his remarks. Kushindana recalled that the appellant sometimes made jokes that had a sexual connotation and that, although she may have occasionally laughed at his jokes, they made her feel uncomfortable. She also recalled that, one time, the appellant yelled at Julie Nguyen for two straight hours and that this made Nguyen cry. Kushindana pointed out that, while she could not hear the conversation, she could hear the appellant yelling. HT2 at 2A-4A.

Kushindana testified that, sometime in January 2005, while the appellant and Julie Nguyen were standing outside her office, near the printer/facsimile machine, she saw the appellant hold onto Julie Nguyen's arm so tight that it left a

red mark on her arm. She explained that, while the appellant was holding onto Nguyen's arm, Nguyen said two or three times that the appellant was hurting her. Kushindana said she told the appellant "can't you see you're hurting her?" She recalled that, eventually, Julie Nguyen stomped on the appellant's foot and that he finally let go. She noted that the appellant was laughing and apparently thought the whole thing was a joke. Kushindana remembered that she wanted to tell someone what the appellant had done at the time but that Nguyen did not want to report the matter. Kushindana indicated that, when Vengazo asked her to give a statement about the appellant, she remembered the incident and she included it in her affidavit.[58] HT2 at 2A-4A.

Kushindana testified that, on one occasion, at the request of Labor Relations Specialist Cheri Alsobrook, she provided a deposition in an EEO case for which she had served as the EEO Counselor. She recalled that the appellant was extremely unhappy with some of the responses she gave during the deposition and he banged his fist on the desk and told her to prepare a correction to the deposition.[59] Kushindana informed Alsobrook that the appellant was displeased with her deposition. Kushindana remembered that Alsobrook was concerned that her position as a witness may have been compromised by what had occurred and that Alsobrook advised agency management as such.[60]

In a March 16, 2005 email message to Lohfink, White, and others, Alsobrook stated the following:

I met with Adimu. A lot of information came out of the meeting, but one of the issues that I find very disturbing is that Donald has ordered Adimu to put in writing that she felt very unprepared for her deposition and to indicate that it was because I did not properly prepare her. . . .
Adimu was confident during her deposition and answered questions without hesitation. She appeared honest, unbiased and to have a clear recollection of the events about which she was being questioned. Now she is a mess. She said that on Friday and again today, Donald pounded his fist on her desk, yelled at her, and told her she had given incompetent answers. She said Donald had led her to believe that her answers had lost the entire case for us. Her eyes repeatedly teared up during our meeting and she is a nervous wreck. I can only imagine how she is going to hesitate and second guess every word she uses tomorrow.
AF, Tab 13(4E) at 500 (emphasis added).
Kushindana further related that she found the appellant's conduct to be disturbing and disheartening and that she just wanted it stopped and for him to manage the office properly. She added that, as the EEO Manager, the appellant should have been aware that his actions were inappropriate. She said that it was never her intention to get the appellant fired. She asserted that, after March 2005, she saw the morale in the office declining and employees were becoming more agitated and upset by the appellant's behavior. Kushindana recalled that eventually the situation came to a head and, therefore, she and

several of her co-workers (Julie Nguyen, Clark, and Bachemin) went together to see Deputy Director White about the appellant sometime before Hurricane Katrina. She explained that, although they were "scared to death," they told White about the appellant's language and behavior in the office and gave him some general examples. Kushindana stated that she had not reported the appellant earlier because she felt intimidated and that she considered it an act of courage for them to report the appellant to White. HT2 at 2A-4A.

Julie Nguyen testified that, sometime in early 2005, she came out of her cubicle and encountered the appellant who was standing in the hall with Kushindana, LeBlanc and Jo Ann Thomas. She recalled that the appellant grabbed the bicep area of her left arm with his right hand. She indicated that, although she told him three times to let her go, he just laughed and did not do so. She remembered that Kushindana also told him to let go of her arm. She related that he finally released her arm after she stomped on his foot. Nguyen indicated that she immediately went to the restroom and that the appellant had left the imprint of his five fingers on her arm. She said she showed her arm to Kushindana, Bachemin, and Clark. Nguyen stated that she did not tell anyone in management at that time about the incident because she feared retaliation. She added, however, that in approximately April 2005, after the T.L. matter, she told John White what had happened. HT1 at 2A-5A.

Julie Nguyen recalled the appellant saying that Jo

Ann Thomas needed to get her "fat ass" in here and that one time she heard the appellant say "mother fucker." Nguyen testified that the appellant would comment that he was going to be a minister and that several of the students were going to assist him with passing the collection basket. HT1 at 2A-5A.

Moreover, in her November 8, 2005 sworn statement, student employee Thuy Thu Nguyen related the following in relevant part:

I have observed Mr. Lewis speaking loudly in the office. He yelled at me a few times, and made me cry. I also observed him yell at Lorri Clark and caused her to cry. He sometimes jokes in the office, but sometimes his jokes can be mean and humiliating.

AF, Tab 13(4E) at 700-01.

Another student employee, Thanh Thuy Nguyen, averred the following in a December 24, 2005 sworn statement:

I was employed in [the Morale Improvement Staff and EEOWSS] for approximately six years. . . .

My supervisor while working in EEOWSS was Donald Lewis, the Chief of that staff. . . .

In the office environment, Mr. Lewis occasionally joked with me and other employees. While I did not take offense at his joking remarks, some of his jokes were about employees in the office and included remarks about their weight, which the employees may have found offensive or embarrassing.

AF, Tab 13(4E) at 697-99.

In a sworn statement, dated October 28, 2005,

NFC employee Lisa Hawkins related the following in pertinent part:

I was employed by the National Finance Center . . . for 11 years prior to leaving on July 9, 2005. [For seven of those years] I worked in the Equal Employment Opportunity and Workforce Services Staff . . . My last position at NFC was Conflict Management Assistant, GS-7, in the EEOWSS. . . . My supervisor while working for the EEOWSS was Donald R. Lewis, Chief, EEOWSS. . . .

His behavior in the office was very inappropriate for the EEO Officer. He was negative about homosexuals and made jokes about sexual preference, religion and people who are overweight.

Mr. Lewis would yell at employees when he was upset with them . . . I recall that he would yell at employees in the presence of other employees.

AF, Tab 13(4E) at 473-75.

Diane O. Barnes testified at the hearing at the appellant's request. She related that she worked for the appellant in Human Resources and/or EEOWSS from 1994 until she retired in January 2004. She indicated that there was a good working environment in EEOWSS and that the appellant seemed to get along with the employees although some employees complained about the way the appellant wanted certain functions performed. Barnes said it was "not commonplace" for the appellant to use vulgar or profane language in the office and that she never heard him make comments about a woman's body or size or a person's sexual orientation. HT1 at 9A-9B.

Barnes testified that the appellant was not overly friendly and could be standoffish but she thought he treated everyone with respect. She opined that the appellant was a very good instructor and that she had learned a lot from him. She related that the appellant wanted things done his way and that he was not a soft-spoken person. She recalled that, at times, the appellant got aggravated with her and vice versa but she never got on his bad side. She added that the appellant spoke in a professional manner and that his volume did not increase even when he got aggravated. Barnes denied that the appellant knew everything that went on in the office but she stated that all work items went through him. Barnes opined that she was the closest thing to a friend the appellant had at the NFC because he did not mingle and was not sociable. She identified HEX F as a statement she prepared on the appellant's behalf after he told her what the allegations against him were. HT1 at 9A-9B.

Doris Campbell Garnier testified on the appellant's behalf. She stated that, from 1989 though 1991, she worked as a Computer Assistant with the appellant when he was the Human Resources Specialist. After 1991, she continued to work at the NFC. She identified HEX J as a letter she provided at the appellant's request. She opined that the appellant was a good manager who encouraged his employees to move up and who expected his employees to do what they were supposed to do. Garnier said the work environment was never bad when she worked for the appellant and that

everyone respected the appellant. She recalled that the appellant was always professional and, to her knowledge, he never used vulgar or offensive language, mistreated, or humiliated anyone. She conceded that the appellant spoke in a loud voice. Garnier added that neither Kushindana nor Clark ever said anything negative to her about the appellant. HT1 at 9B-10A.

Judith Welcker testified at the appellant's request. She recalled that she worked in Human Resources from October 1990 through March 2006 when she took a Conflict Prevention Specialist position in EEOWSS. She noted that the appellant hired her in October 1990 and that she worked for him until 1996/1997 when he left to start the Morale Improvement Staff, which later became EEOWSS. Welcker identified HEX H as a letter she wrote at the appellant's request. She opined that the appellant was an excellent supervisor and that he related very well with his employees. She said he was always fair and accessible to his employees and that he treated his employees with respect. She recalled that, when she worked for the appellant in Human Resources, the office atmosphere was very good. Welcker indicated that the appellant never made sexual remarks, told inappropriate jokes, or said anything offensive in her presence. HT1 at 10A.

Candace R. Letort testified on the appellant's behalf. She said that she worked for the NFC for 32 years and that, as of November 12, 2006, she has held the position of Associate Director of Operations for the Government Employees

Services Division at the NFC in New Orleans. Prior to that, she was the Chief, Administrative Payments Branch, in the Comptroller Operations Division at the NFC. She also served as the head of the TSP Service Office from April 2000 until November 2004. Letort recalled that, when she took over TSP, the program was rife with personnel and labor issues and EEO complaints. She indicated that from 1989 though 2000, she worked only sporadically with the appellant but after 2000, when she took over the TSP Program, she began working more closely with him because she wanted everything to be done right and as quickly as possible. Letort stated that the appellant had an impeccable reputation and that he was held in very high esteem. HT1 at 10A-10B.

Letort identified HEX G as a letter she wrote at the appellant's request after she was informed by his attorney what issues were involved. She testified that she observed the appellant interacting with his employees when she was in the EEOWSS area discussing a case or a problem and that she only saw him treat his employees in a professional and business-like manner. She said it was always a pleasure to work with the appellant. She recalled that the appellant not only espoused EEO practices and principles but he lived them, *i.e.*, he treated people fairly, impartially and equally regardless of race, background, and religion. Letort stated that the appellant has always been an asset to the agency. She indicated that she has never known him to belittle anyone; rather he had a high regard for his employees' feelings and he

always went out of his way to be sensitive to those feelings. Letort noted that the appellant had high expectations for his employees and that he held them accountable for their actions just as he did himself. She acknowledged that she had not seen the appellant's removal letter. HT1 at 10A-10B.
Duvernay, a current EEOWSS employee, testified at the appellant's request. She stated that she never had any problems with the appellant but that he was very demanding. She related that the appellant had a "very direct" management style and he wanted work to be done timely and in a certain way. She said he was very customer service oriented and he would let an employee know if they were not doing what he wanted. Duvernay indicated that the appellant was very knowledgeable and experienced and that he was open to discussing issues even if your opinion differed from his. She added that she could always speak freely to him. She acknowledged that she wrote in her January 18, 2006 affidavit that the appellant "deals with employees who do not work and rewards employees who do work."[61]
Duvernay conceded that she wrote in an April 22, 2006 letter to the appellant's attorney at that time, that there were several occasions when she witnessed EEOWSS employees acting disrespectful to the appellant and that he did not do anything about it.[62] She testified that the appellant picked his battles and that sometimes he did not deal with every single issue. HT1 at 11A-11B.
Duvernay recalled that several times Julie Nguyen refused to perform tasks the appellant had given

to her. She remembered that, one time, Nguyen refused to distribute training materials because the appellant would not allow her to attend the training. She explained that, on that occasion, she was standing outside the appellant's office when he discussed the matter with Nguyen and that she heard him raise his voice. Duvernay remembered that she tried to diffuse the situation between the appellant and Julie Nguyen but the appellant told her to go back to her office. She claimed this was the only time she ever heard the appellant raise his voice with another employee although she conceded that he sometimes raised his voice with her and she with him. She added that the appellant's voice escalates when he gets upset. HT1 at 11A and 11B.

Duvernay testified that the appellant had a shortcoming when it came to communicating information he learned in senior staff meetings to his employees. She said oftentimes, the EEOWSS staff heard about an NFC matter from employees in other sections who had learned about it from their managers, before the appellant gave them the information. Duvernay denied that she ever observed the appellant belittle anyone, use obscene language, or make an inappropriate comment concerning someone's weight/size, sexual orientation, or religion. Duvernay said that she worked at EEOWSS at the same time as LeBlanc, Goss, Thomas, and Barre. She indicated that she did not remember any of these women ever telling her they had problems with the appellant, except on one occasion LeBlanc asked

her to tell the appellant to say "Hello" and "Goodbye" when he speaks on the telephone. Duvernay recalled that she only saw the appellant bang his hand on a desk one time, when he got upset during union negotiations. HT1 at 11A and 11B.

Duvernay conceded that she indicated in her January 18, 2006 affidavit that the appellant was unpopular. That is, she wrote, "Mr. Lewis' unpopularity likely comes from the fact that, unlike many other managers at NFC, he does take appropriate action (e.g., dealing with poor performance, addressing misconduct in a progressive manner, etc.)"[63] She opined that he made unpopular choices at times. Duvernay related that, from about 2000 until 2005, the appellant was well liked by his employees but that, thereafter, some employees did not like him as much as they did before. She explained that a large part of the workforce asked to be reassigned to work with the appellant but that, over time, many left when he did not give them the performance appraisal or award they wanted. She insisted that they did not leave because of the way the appellant treated them. HT1 at 11A and 11B.

Myloc Nguyen testified that she never heard the appellant use obscene language in the office and none of her co-workers ever told her that they heard the appellant do so. She stated that she also never heard the appellant make jokes about religion, speak badly about homosexuals, or use the phrase "fat ass." She indicated that, before the

RIF, Clark told her that the appellant made Julie Nguyen cry but Julie Nguyen never told her that. She further related that she never saw the appellant pound his fist on a desk. Myloc Nguyen recalled that she heard Julie Nguyen cursing in the office all the time and that, on one occasion when Myloc Nguyen brought chicken into the office for everyone, Julie Nguyen told her that the appellant should "eat shit" and not share in the chicken. HT2 at 1A-2A.

The appellant testified that he had no memory of ever using vulgar or profane language or saying the words "bastard" or "mother fucker" in the office. He also said that he never made any inappropriate comments about homosexuals, religion, or weight. He denied that he ever called anyone a "fat ass" in the workplace. The appellant pointed out that if he had told Kushindana and Julie Nguyen to tell Thomas to get her "fat ass" in here, they would have told Thomas and she would have testified to that effect. The appellant related that the picture that LeBlanc mentioned in her testimony was taken so that NFC employees would be able to identify the EEO counselors. He recalled that LeBlanc told him that she did not like the picture and that he said something like "you look prominent and stand out." He said he made this comment to give a positive spin to the picture and to appease LeBlanc. He stated that LeBlanc never said she was offended by the picture and that she could have gotten another picture made if she had really wanted to. The appellant opined that LeBlanc was merely trying to impose her own

feelings and insecurities about her weight on him. HT2 7A-11B.

The appellant denied ever pounding his fist. He asserted that the employees who said he pounded his fist did not frequent his office. For example, he related that his secretary, Clark, would just come into his office to pick up documents and would not stay. He added that Julie Nguyen also would not remain in his office for a prolonged period of time. The appellant also denied that he ever criticized his employees harshly. He contended that Julie Nguyen complained often and was short with him whether it was on the telephone or in person but he said he never spoke to her in a harsh manner.

The appellant remembered the incident with Julie Nguyen's arm. He said he was going down the hall on his way to the restroom and as he came around the corner near Kushindana's office he came upon Nguyen and Kushindana standing in the hall. He related that Nguyen was motioning with her arms and that, as he came around the corner, he "caught" her arm in the "cup" of his hand as it was "coming down" towards him. He added that she then kicked him and he continued to move on to the restroom. The appellant stated that all of this occurred in "one motion" and then it was over. He indicated that Nguyen did say something about letting go of her arm and that Kushindana may have said something similar but he did not remember the event clearly. However, the appellant said he did not squeeze Nguyen's arm hard enough to leave a mark unless she was

especially sensitive. HT2 7B-11B; see also AF, Tab 15 (Stipulated Facts).

The appellant claimed that Barre harbored ill feelings towards him when she left EEOWSS and that she was not telling the truth. He explained that she was upset with him when he reassigned her from her Conflict Management position. He said he did so because other employees had better skills in raw conflict than Barre and this disturbed her. HT2 7B-11B.

Specification A

The appellant conceded that he made contact with Julie Nguyen's arm, although he claimed it was accidental. The appellant testified that, after making contact with Julie Nguyen's arm, she kicked him, which he apparently ignored as he continued on to the restroom. I find unconvincing the appellant's version of the events surrounding the incident with Julie Nguyen's arm. I find it to be inherently implausible that the appellant would do and say nothing after one of his subordinate employees kicked him for what he would have the Board believe was no reason. Hence, I credit Kushindana and Julie Nguyen's version of these events over the appellant's. Therefore, I find that Specification A is sustained.

Specification B

The appellant denied ever making inappropriate comments and/or jokes in the workplace. On the other hand, LeBlanc testified at the hearing, and averred in her November 15, 2005 sworn statement, that she had first hand knowledge of the appellant making inappropriate comments

and gestures in the workplace about peoples' weight. I find that LeBlanc testified in a credible, straightforward manner and that she had no apparent motive or reason to lie about the appellant. Moreover, for the reasons discussed earlier concerning the appellant's credibility, I credit LeBlanc's testimony on these matters over the appellant's.

I also find that Barre testified in a clear, concise, and believable way that she heard the appellant make inappropriate and offensive jokes and comments about peoples' weight, women's anatomy, homosexuals, and religion. Her hearing testimony was consistent with her December 7, 2005 affidavit, even though some of the examples she gave at the hearing were not included in that statement. Furthermore, Barre has not worked for the appellant since December 2003 and was not impacted by the RIF. While the appellant speculated that Barre was lying about him because of a reassignment, Barre freely admitted that her feelings were hurt by the manner in which the appellant reassigned her. Furthermore, based on my observations of Barre's demeanor and manner while testifying, I credit her testimony over that of the appellant.

Goss recalled that the appellant made comments about religion and peoples' weight. She also related that she heard the appellant refer to an EEO complainant as a "mother fucker" and that the appellant used the term "fat ass" in the office. I find that Goss testified in a believable and straightforward manner and that her testimony was

consistent with her November 22, 2005 affidavit. In addition, her testimony concerning the appellant's statements about religion and weight was corroborated by that of Barre and LeBlanc.
As for the appellant's proffered witnesses, neither Garnier nor Welcker worked for the appellant after he took over the EEOWSS in 1996/1997.[64] Letort also never worked on a daily basis in EEOWSS and Barnes retired in January 2004. Barnes testified, however, that it was "not commonplace" for the appellant to use vulgar or profane language. I take this to mean that, at some time, she heard him use inappropriate language in the office. Moreover, I do not find that because the appellant's witnesses may not have heard him make an inappropriate comment or joke to mean that he never made such comments outside of their presence.
Accordingly, after considering the record in its entirety, I find that the agency has met its burden of proving that it is more likely true than untrue that the appellant made inappropriate remarks in the office concerning homosexuals, overweight people, and religion. I also find that Goss credibly testified that the appellant used the terms "mother fucker" and "fat ass" in the workplace. Hence, I find that the agency has met its burden of proving the facts in Specification B.
Specification C
The appellant denied that he ever pounded his fist on a desk. However, the appellant's own witness, Duvernay, recalled that the appellant banged his hand on a desk one time when he got upset

during union negotiations. Moreover, the record reflects that, in March 2005, Kushindana told Alsobrook that the appellant banged his fist on the desk. Consequently, I find that the agency has shown that it is more likely true than untrue that the appellant, on occasion, pounded his fist on a desk. Thus, Specification C is proven.

Specification D

Thomas worked for the appellant in EEOWSS from 1997 until she retired in December 2005 as a GS-13 EEO Counselor. Thomas, who was assigned by the appellant to train Julie Nguyen, recalled that the appellant frequently screamed at Julie Nguyen and belittled and humiliated her to the point that Julie Nguyen feared him. I find that Thomas testified in a credible manner based on my observation of her demeanor and because she had no apparent bias or reason to lie about the appellant. Moreover, Julie Nguyen's demeanor while testifying in close proximity to the appellant corroborated Thomas' assertion that she feared the appellant, *i.e.*, Nguyen averted her eyes and avoided looking in the appellant's direction.

In addition, LeBlanc testified that she observed the appellant make Clark and Julie Nguyen cry. Myloc Nguyen recalled that Clark told her, before the RIF, that the appellant made Julie Nguyen cry. Barnes recalled that she never got on the appellant's bad side, which suggests that the appellant had a bad side one would prefer to avoid. Thuy Thu Nguyen related in her sworn statement that the appellant yelled at her on several occasions and caused her to cry. She also indicated that she saw the

appellant make Clark cry.
The appellant's own witness, Duvernay, described an incident when the appellant was chastising Julie Nguyen to the point that Duvernay attempted to intervene and to diffuse the situation. Even if Duvernay is to be believed that, on occasion, Julie Nguyen refused to comply with the appellant's instructions, humiliating and demeaning treatment of a subordinate employee is inappropriate and uncalled for behavior by a person in the appellant's position.
Therefore, after considering the entire record, I find that it is more likely true than untrue that the appellant was so harsh in his private and public criticism of employees such as Julie Nguyen and Lorri Clark that he humiliated and caused them to cry. Hence, I find that Specification D is proven.
I have sustained all of the factual specifications cited in support of
Charge VII. Accordingly, Charge VII is sustained.
The agency has established that the appellant made false statements during an official investigation.
Charge VI of the notice of proposed removal stated the following:[65]
When you were interviewed for the investigation on August 19, 2005, an oath was administered through which you swore that your testimony was true and complete. When you were interviewed on December 9, 2005, you were advised that you remained under oath for the testimony provided that day. During your interviews and in your sworn Affidavit you have made multiple statements that

are not true and which are disputed by the sworn testimony of other witnesses. The following are illustrative examples of the false statements you made during this official investigation.

Specification A.

You testified that you have never used vulgar or profane language in the workplace. You were specifically asked if you had ever said or used the term "fat ass" in the workplace, and you denied that you had ever done so.

In your Affidavit dated January 19, 2006, you testified, "I also deny that I have ever joked about an employee's weight and that I never used the term or said 'fat ass' in the office to refer to a staff member or for any other reason. . . The records in these subject areas will speak for themselves. . . The people making these unwarranted and unsupported statements are those who are trying to get something through these attacks that they cannot get through honest means."

Contrary to your sworn testimony, a number of your subordinate employees, namely, Kathleen Goss, Lisa Hawkins, Adimu Kushindana, Julie Nguyen, and Thanh Thuy Nguyen, testified that you use the term, "fat ass" to refer to overweight staff members and others. Kathy Barre, Kathleen Goss, and Adimu Kushindana testified that you also have used the terms, "bastard" and "mother fucker," all of which you deny ever saying. Adimu Kushindana and Julie Nguyen also testified that when speaking to them, you have referred to JoAnn Thomas by saying, "Tell her to get her fat ass in here."

Your denial of this misconduct in the face of

overwhelming sworn testimony to the contrary from your subordinate employees constitutes your making false statements during an official investigation.

Specification B.

A number of current and former EEOWSS employees (Patricia Bachemin, Kathy Barre, Lorri Clark, Kathleen Goss, Lisa Hawkins, Adimu Kushindana, Shirley LeBlanc, Julie Nguyen, Alger Taylor, and JoAnn Thomas) testified that Myloc Nguyen spent the majority of her time at work at NFC on activities related to her outside commercial businesses from which she makes a profit. The employees testified that Ms. Nguyen used Government equipment (computer, color printer, color copier, fax machine, telephone) and supplies (paper, inks) with impunity to perform the work-related to her outside businesses.

Ms. Nguyen admitted in her sworn testimony that she has worked on her outside, for-profit, business activities on Government time and Government equipment.

Patricia Bachemin testified that she observed you on at least one occasion reviewing menus and various documents that Ms. Nguyen had prepared related to her businesses as she was making multiple copies of these documents on the EEOWSS copy machines.[66] It was also reported that you have removed faxed documents from the fax machine that are related to Ms. Nguyen's private outside businesses and have delivered them to her. Adimu Kushindana testified that she handed you a fax that Myloc Nguyen had sent or received

related to her outside business and discussed Ms. Nguyen's misuse of Government equipment with you at that time.
In your sworn testimony, you denied knowing that Myloc Nguyen had used Government time and equipment for private gain when she used the equipment and time for activities related to her outside businesses.
Your denial of knowledge of this very serious misconduct in the face of sworn testimony to the contrary from ten of your subordinate employees, constitutes your making false statements during an official investigation.
AF, Tab 13(4Q).
Specification A.
As was previously discussed above in my analysis of Charge VII, Specification B, I have found that the appellant used the terms "mother fucker" and "fat ass" in the workplace. I also found that the appellant made comments about people's weight.
In his January 19, 2006 affidavit, the appellant averred the following in relevant part:
I also deny that I have ever joked about an employee's weight and that I never used the term or said "fat ass" in the office to refer to a staff member or for any other reason.
AF, Tab 13(4E) at 514.
After considering the record evidence, I find that the agency has established by preponderant evidence that the appellant supplied false information to Vengazo in his January 19, 2006 affidavit when he denied ever making jokes about

weight or using the term "fat ass." I further find that he did so knowingly, with the intention of deceiving or misleading the agency. *Haebe v. Department of Justice*, 288 F.3d 1288, 1305 (Fed. Cir. 2002), citing to *Naekel v. Department of Transportation*, 782 F.2d 975, 977 (Fed. Cir. 1986). Accordingly, Specification A is sustained.

Specification B

Although many of the appellant's employees testified that they were aware that Myloc Nguyen spent the majority of her time at work performing activities related to her outside businesses, I did not find in my analysis of Charge III, Specification A, that the appellant had actual knowledge of Myloc Nguyen's activities. Rather, I found that the agency established that the appellant had sufficient information about Myloc Nguyen's possible wrongdoing that, by failing to take any action whatsoever to curtail her conduct, he allowed her misconduct to continue.

Therefore, I find that the agency failed to meet its burden of proving that the appellant made a false statement when he denied knowing that Myloc Nguyen used government time and equipment for private gain. Hence Specification B is not sustained.

Conclusion

I have sustained only Specification A of Charge VI. Nevertheless, where more than one factual specification is set out to support a single charge, proof of one or more, but not all, of the supporting specifications is sufficient to sustain the charge. *Burroughs v. Department of the Army*, 918 F.2d 170,

172 (Fed. Cir. 1990). Consequently I find that the agency has met it burden of proving Charge VI by preponderant evidence.

The appellant has not proven that the agency committed harmful procedural error.

To prove harmful procedural error, the appellant must prove that the agency committed an error in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. *See* 5 C.F.R. § 1201.56(c)(3) (2007). The burden is upon the appellant to show that the agency committed an error and that the error was harmful, *i.e.*, that it caused substantial prejudice to his rights.

Here, the appellant asserts that the agency violated a March 24, 2003 memorandum regarding the preparation of employee misconduct investigation reports because Vengazo's ROI contained her personal opinion, conclusions, and recommendations regarding the appellant's discipline. *See* HEX A. The memorandum states in pertinent part that "Investigators should avoid personal opinions or conclusions, and should not make disciplinary recommendations a part of the report." *Id.* Keith A. Prue, USDA's Program Manager for the Misconduct Investigation Program and the author of the memorandum at issue, testified that the purpose of the document was to provide guidance on how to write ROIs to agency investigators. He pointed out that it was addressed to Agency/Mission Area Employee Misconduct

Investigation Coordinators and that it was not prepared with outside contractors, such as Vengazo, in mind. Prue stated that his memorandum was not official USDA policy but was intended solely as guidance. He explained that the reason for the memorandum was to attain USDA-wide consistency in the preparation of ROIs but he added that it had no legal weight. Prue identified HEX 5 as the portion of the USDA's Personnel Manual regarding misconduct investigations [hereinafter "Manual"]. He noted that the Manual did not cover contract investigators and that it did not preclude the investigator from making recommendations or conclusions. Prue conceded that his memorandum had not been rescinded. HT1 at 1A-1B.

Prue further related that he reviewed Vengazo's ROI. He acknowledged that Vengazo's ROI was prepared contrary to the guidelines contained in his March 2003 memorandum since it contained her personal opinion, conclusions, and recommendations. He testified, however, that he found it contained sufficient information and evidence to assist the deciding official in making his decision. He emphasized that, although he had the authority to recommend that Vengazo's ROI be rewritten or that the investigation be redone, he did neither. Prue also pointed out that nothing in the agency's Manual prohibited contracting out an investigation to a non-agency employee such as Vengazo. HT1 at 1A-1B.

After considering the whole record, I find that the

appellant has failed to establish that the agency committed any error in the application of its procedures. I find that Prue's memorandum was intended only as guidance and that it was not meant to have the effect of a law, rule, regulation, or official agency policy or procedure. On its very face, the document indicates it is merely guidance. On the other hand, the USDA's Manual states that it establishes "the policy and procedures for agency investigations of employee misconduct." HEX 5. My review of the Manual reveals no prohibition against opinion, conclusions, and recommendations.

Nevertheless, assuming arguendo that the agency erred by not complying with the guidelines set out in Prue's memorandum, Lohfink, the deciding official, testified without contradiction that, because the appellant questioned the validity of Vengazo's investigation, he gave no consideration whatsoever to Vengazo's investigative summary, found at AF, Tab 13(4E) at 1-56. HT2 at 4A-7B. He noted that the summary was the only place in the ROI that contained Vengazo's recommendations and conclusions. He said he focused solely on the evidence and affidavits contained in the ROI and avoided Vengazo's summary. Lohfink added that he would have made the same decision if another employee was involved and he was presented with the same evidence and affidavits found in the appellant's file. Therefore, I find that the appellant failed to establish that a different conclusion would have been reached in the absence or cure of the error. Hence, I find that the appellant's affirmative

defense must fail.

The penalty imposed is reasonable and promotes the efficiency of the service.

Before it can be concluded that a particular penalty promotes the efficiency of the service, it must appear that the penalty takes reasonable account of all relevant mitigating factors in the particular case. *See Douglas*, 5 M.S.P.R. at 302. In making such determinations, the Board gives due weight to the agency's primary discretion in exercising its managerial function to maintain employee discipline and to make certain that the efficiency of the service is served within its organization. *See Thomas v. U.S. Postal Service*, 96 M.S.P.R. 179, ¶ 17 (2004); *Douglas*, 5 M.S.P.R. at 306. The Board's function is not to displace management's responsibility in this regard but it is to ensure that managerial judgment has been properly exercised. *Lavette v. U.S. Postal Service*, 96 M.S.P.R. 239, ¶ 17 (2004). In the instant case, I have sustained all of the agency's charges. When all of an agency's charges are sustained, the Board may only mitigate the agency's original penalty to the maximum reasonable penalty when it finds the agency's penalty was too severe. *Lachance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999).

In his September 14, 2006 decision letter, NFC Director Lohfink wrote that in determining the appropriate penalty he considered the *Douglas* factors. He related that he considered the nature and seriousness of the appellant's offenses in relation to the appellant's duties, position, and

responsibilities. He noted that the appellant had many years of outstanding service, had "keen abilities in case management," a "fine strategic approach to program management," and that he had produced many quality results for the agency. He said he considered the appellant's 36 years of Federal service, which included service as an Employee Relations Specialist, a Labor Relations Specialist, and an EEO Manager. Lohfink indicated that he considered that the appellant had no prior disciplinary actions on his record. AF, Tab 13(4D). Lohfink also pointed out that, from his work experience, the appellant was aware of what was considered inappropriate behavior for a supervisor/manager. Lohfink related that, as a GS-14 manager, the appellant was responsible for promulgating and upholding the rules governing the very offenses he had committed and, therefore, he found the appellant's actions to be especially egregious. He emphasized that, as the NFC's EEO manager, the appellant was supposed to set the tone for compliance with the rules and policies he had transgressed. Lohfink added that it appeared that the appellant let his "personal needs and desires" influence his behavior and outweigh the need for the appellant to conduct himself in the manner that his position required. AF, Tab 13(4D).

Lohfink related that he considered the appellant's acceptance of more than $42,000.00 without securing proper and required management approval to be an "extremely serious breach of public trust and the employee-employer

relationship." He stated that the appellant's negligence in allowing employees to conduct personal business for personal gain on government equipment and time to be a serious dereliction of his managerial responsibilities. Lohfink noted that the appellant's use of subordinate employees to work on his own personal matters, for personal gain, on government time and equipment was a significant violation of statutory and regulatory requirements. He further indicated that he considered that the appellant, the EEO manager, failed to take appropriate action in response to "a known workplace issue relating to sexual harassment" involving two of his employees. Lohfink said that he considered the appellant's actions to be intentional and that "for the most part" they were for personal gain. He noted that the appellant's misconduct affected his ability to rely on the appellant to continue performing as a supervisor/manager. Lohfink added that the appellant's removal was consistent with the agency's table of penalties and was consistent with actions taken against other employees for similar offenses. AF, Tab 13(4D).

At the hearing, Lohfink reiterated the various *Douglas* factors he discussed in his September 14, 2006 decision letter. He emphasized that he took into account the appellant's 36 years of Federal service and that he had been an exemplary manager and an outstanding performer for the NFC. He related that, based on the appellant's misconduct, he decided that the appellant could not remain as a supervisor. He said he considered

demoting the appellant to a non-supervisory position but he concluded that he could no longer trust the appellant in any position at the NFC. Lohfink explained that the NFC is responsible for making payments on behalf of its client agencies and for protecting individual agency employee's private information. He noted that every dollar of the NFC's operating budget comes from user fees paid by the NFC's customer agencies for the work it does on their behalf. Lohfink added that, if the appellant was returned to a position with fiduciary responsibilities and was to repeat the misconduct cited in Charge I, it could be the "death knoll" for the NFC. Lohfink said he was required to report the unauthorized payments received by the appellant to the agency's Office of the Inspector General. HT2 at 4A-7B.

In evaluating a penalty determination, the Board will consider, first and foremost, the nature and seriousness of the misconduct and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or was frequently repeated. *Dunn v. Department of the Air Force*, 96 M.S.P.R. 166, 172 (2004); *Hernandez v. Department of Agriculture*, 83 M.S.P.R. 371, 374 (1999). Here, I find that the appellant's proven misconduct was extremely serious in light of the position he held as the Program Manager for the agency's EEOWSS staff. Moreover, the Board has held that supervisors are held to a higher standard of conduct than other employees. *See, e.g., Cantu v. Department of the Treasury*, 88 M.S.P.R. 253, 257 (2001).

I find that the deciding official considered the relevant *Douglas* factors under the circumstances of this case. Hence, upon review of the record, I find the deciding official's determination that the penalty of removal was warranted in this case was neither arbitrary, capricious, nor unreasonable and was for such cause as will promote the efficiency of the service. Thus, I find no basis to disturb the agency's chosen penalty based on the sustained charges.

Decision

The agency's action is AFFIRMED.

FOR THE BOARD: /s/_____

Anna M. Love

Administrative Judge

notice to parties concerning settlement

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. *See* 5 C.F.R. § 1201.112(a)(5).

NOTICE TO APPELLANT

This initial decision will become final on **June 14, 2007**, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must

establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30

days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (see 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be <u>received</u> by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found

in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/contents.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

[1] The core functions of the EEOWSS "entailed implementing management and employee morale factors, and preventing and resolving any type of workplace dispute." AF, Tab 20, Hearing Exhibit (HEX) C.

[2] During the telephonic prehearing conference, the parties confirmed that they had agreed to the 14 factual stipulations contained in the agency's prehearing submissions. See AF, Tab 17. The parties may stipulate to any matter of fact, and that stipulation satisfies the burden of proving that fact. 5 C.F.R. § 1201.63 (2007).

[3] See AF, Tab 13(4E) for Vengazo's Report of Investigation (ROI).

[4] Lohfink did not sustain Charge V, taking retaliatory action against subordinate employees following their making protected disclosures during an official investigation. AF, Tab 13(4D).

[5] Lohfink's decision letter did not specify the

effective date of the appellant's removal. See AF, Tab 13(4D). The parties stipulated that this did not deprive the appellant of any important rights. See AF, Tab 15 (Stipulated Facts).

[6] See HEX A for Prue's March 24, 2003 memorandum.

[7] See HEX 2.

[8] HEX 2 at 11.

[9] See AF, Tab 13(4E) at 686-94.

[10] AF, Tab 13(4E) at 529.

[11] Lohfink provided unrebutted testimony that Myloc Nguyen and Diane Barnes, as well as Tim Gaydos before them, were able to process the appellant's compensatory time payments because they had the authority to handle OWCP payments. HT2 at 4A-7B. He further related that the appellant had managerial responsibility over the OWCP program. *Id.*

[12] See HEX 3 for notes from various senior staff meetings.

[13] Even when a specific intent is irrelevant to whether a charge has been proved, "whether the offense was intentional or technical or inadvertent" is always a factor to be considered in assessing the reasonableness of an agency's penalty. *Cross v. Department of the Army*, 89 M.S.P.R. 62, ¶ 10 (2001), citing *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305 (1981).

[14] AF, Tab 13(4E) at 67-71.

[15] Title 29 C.F.R. § 1604.11(a) defines sexual harassment that violates section 703 of Title VII as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a

sexual nature, when, among other things, such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

[16] The record reflects that, on March 9, 2005, Kittel emailed the appellant asking him to obtain statements from any witnesses to the incidents in question. AF, Tab 13(4E) at 659. On March 18, 2005, the appellant sent an email to Kushindana and Julie Nguyen confirming that, per Kittel's request, he had asked them if they had any witnesses and that he wanted their statements by March 21, 2005. *Id.* at 660.

[17] *See* AF, Tab 13(4E) at 530.

[18] The appellant testified that they had a "data call" in November 2004, where all NFC employees were asked to provide basic information regarding their prior service in anticipation of a RIF. HT2 at 8A-9B.

[19] AF, Tab 13(4E) at 486.

[20] AF, Tab 13(4E) at 487.

[21] *See* AF, Tab 13(4E) at 656 and 661.

[22] *See* AF, Tab 13(4E) at 664-67.

[23] Julie Nguyen averred in her short February 17, 2005 statement that "[o]n or about February 9, 2005," T.L. made the "I like having sex" comment. AF, Tab 13(4E) at 478, 483, 656 and 661. She further related that T.L. came around again on February 15, 2005 and that she tried to ignore him. She added that his comments made her feel uncomfortable.

[24] *See* AF, Tab 13(4E) at 484-85 for the same

statement from Julie Nguyen, which was signed and dated March 22, 2005, and was attached to Kraig Kittel's December 2, 2005 affidavit. According to Kittle, Julie Nguyen's two-page statement, this copy of which appears to have been initialed "KK" by Kraig Kittel, was an update to her earlier February 17, 2005 statement. *Id.* at 476; *see also id.* at 656-57 and *supra* n.16.

[25] *See* AF, Tab 13(4E) at 657-58; *see also id.* at 484-85.

[26] The appellant accused Patricia Bachemin of fabricating various allegations against him because she did not believe that he supported her promotion to a GS-12 EEO Specialist position. HT2 at 7B-9A (the appellant); *see* AF, Tab 13(4E) at 512-13;
HEX 1, Vol. 1 of the appellant's deposition, page 121; *see also* HEX 7 at 3, for a list of Bachemin's complaints about the appellant.

[27] *See* HEX 7 for Lohfink's notes of that meeting.

[28] By written notice, dated July 7, 2005, Julie Nguyen was informed that she was going to be reassigned under the RIF from her GS-7 EEO Assistant position in EEOWSS to a GS-7 Contact Representative position in the Government Employees Services Division. *See* AF, Tab 13(4E) at 648-51. In June 2006, pursuant to another RIF, Julie was demoted to a GS-6 Pay Technician position. HT1 at 4B.

[29] Pursuant to my authority under 5 C.F.R. § 1201.64, I take official notice that Hurricane Katrina made landfall on the Gulf Coast of the United States on August 29, 2005. *See* 5 C.F.R. § 1201.64 (2007)

(authorizing administrative judges to take official notice of matters of common knowledge or that can be verified). After Hurricane Katrina, the NFC facility in New Orleans was closed until November 14, 2005, and NFC employees were disbursed to alternate work sites. *See, e.g.*, AF, Tab 13(4E) at 349 (Lorri Clark's December 7, 2005 affidavit) and 423 (Vengazo's memorandum for the record).

[30] Julie worked with TSP from 1987 to 2001. AF, Tab 13(4E) at 637.

[31] Thomas previously used the last name "Vincent." HT1 at 7A.

[32] AF, Tab 13(4E) at 478-79.

[33] AF, Tab 13(4E) at 480-85.

[34] In her January 18, 2006 affidavit, Duvernay averred that Byrne told her that she had been contacted that morning by the appellant regarding two allegations of sexual harassment against T.L. AF, Tab 13(4E) at 415.

[35] *See* AF, Tab 13(4E) at 421-22 for additional information about Bachemin's promotion.

[36] Ultimately, Julie Nguyen's and Kathleen Goss's positions were eliminated. AF,
Tab 13(4E) at 521. However, Goss was ultimately reassigned from her GS-12 Conflict Management Specialist position to a vacant Conflict Prevention Specialist position within EEOWSS at the same grade and pay. *See* AF, Tab 13(4E) at 419-20.

[37] *See* AF, Tab 13(4E) at 648 for Julie Nguyen's July 7, 2005 RIF notice.

[38] In her January 30, 2006 affidavit, Kushindana said the appellant "once asked me while at work to check on a trip to Disney World for him." AF,

Tab13(4E) at 503-05.
[39] AF, Tab 13(4E) at 507.
[40] As was mentioned above, Goss was reassigned to another job in EEOWSS, at the same grade and pay, and was not separated because of the RIF. *See supra*, n.36.
[41] *See* AF, Tab 13(4E) at 419-20.
[42] *See* AF, Tab 13(4E) at 431.
[43] AF, Tab 13(4E) at 731.
[44] *See* AF, tab 13(4E) at 517.
[45] Specification A, which was not sustained, asserted that the appellant asked subordinate employees to run errands for him. AF, Tab 13(4Q).
[46] AF, Tab 13(4E) at 520.
[47] *See* AF, Tab 13(4E) at 351-404, 493-96, 1579-1653.
[48] *See* AF, Tab 13(4E) at 700-01.
[49] *See* AF, Tab 13(4E) at 75.
[50] Neither of these two students are Thuy Thu Nguyen.
[51] *See* HEXs V (Thanh-Thuy Nguyen) and W (Hanh Nguyen).
[52] *See* AF, Tab 13(4E) at 506-09.
[53] *See* AF, Tab 13(4E) at 506-09.
[54] AF, Tab 13(4E) at 428.
[55] AF, Tab 13(4E) at 729.
[56] AF, Tab 13(4E) at 728.
[57] *See* AF, Tab 13(4E) at 342-43a.
[58] *See* AF, Tab 13(4E) at 487.
[59] *See* AF, Tab 13(4E) at 501-02 for Kushindana's March 16, 2005 email message to Alsobrook making corrections to her September 2, 2004 deposition.
[60] *See* AF, Tab 13(4E) at 500 for Alsobrook's March

16, 2005 email message about Kushindana's deposition.

[61] AF, Tab 13(4E) at 413.

[62] *See* HEX E at 4.

[63] AF, Tab 13(4E) at 415.

[64] Welcker testified that in March 2006, she took a job in EEOWSS. HT1 at 10A. On March 28, 2006, the appellant was placed in a paid, non-duty status. AF, Tab 13(4P).

[65] The notice of proposed removal cited five factual specifications. AF, Tab 13(4Q). Lohfink sustained only Specifications A and B. *See* AF, Tab 13(4D).

[66] Because the appellant expressed concern that Bachemin was biased against him and the agency failed to proffer her as a witness who could be cross examined at the hearing, I have not given any weight to Bachemin's written statements.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2008-3031

DONALD R. LEWIS,

Petitioner,

v.

DEPARTMENT OF AGRICULTURE,

Respondent,

Petition for review of the Merit Systems Protection Board in DA0752060686-I-1.

ORDER

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

Before Bryson, Circuit Judge, Clevenger, Senior Circuit, Judge, and Dyk, Circuit Judge.

A petition for rehearing having been filed by

the Petitioner,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be,

and the same hereby is, DENIED.

The mandate of the court will issue on May

8, 2008

FOR THE COURT,
/s/
Jan Harbaly
Clerk

Dated: 05/01/2008

cc: Donald R. Lewis
Anuj Vohra

LEWIS V AGRICULTURE, 2008-3031
(MSPB-DA0752060686-I-1)

TO: Agency/Mission Area Employee Misconduct Investigation Coordinators

FROM: Keith A. Prue /s/
Program Manger, Misconduct Investigation Program
Personnel Policy and Partnership Division

SUBJECT: Employee Misconduct Investigation Reports

To ensure Department wide standards of quality and consistency in the preparation of employee misconduct investigation reports, the following guidance is provided.

GENERAL

It is important that **misconduct investigators** obtain the necessary information or evidence to enable a decision-making official to determine what action should be taken . **The report must cover the issues in an impartial, concise, understandable and accurate manner. Investigators should avoid personal opinions or conclusions, and should not make disciplinary recommendations a part of the report.**

Use abbreviations when proper nouns are repeatedly used in the report. Abbreviate names of agencies, organizations and staffs after spelling them out initially, When There are too many

acronyms in a report the reader may become confused. If this appears likely, choose an abbreviation that will enable the reader to better associate the shorter text with he actual name. Fore example, after identifying the person as State Director Smith, use SD Smith.

Identify individuals fully when first introduced in the report. Fore example: Jane Smith, Director, Financial Management Division, Farm Service Agency, GS-15, Washington, DC. Indicate whether the individual is a supervisor. The individual should then be referred to by last name only in the remainder of the report, unless the same name applies to two or more entities, When names are referenced far apart in the report or in different, sections, it may be necessary to partially identify the person again so the reader does not get confused.

Separate the report (not the exhibits) when it is lengthy, complex, or contains more than one issue. Present the details in sections under the appropriate headings. For example, in a report addressing two separate allegations of misconduct, organize the report into two sections: Misuse of Government Property in one section an Misrepresentation of Official Position in another section, instead of preparing a single narrative that jumps from one allegation to the next allegation.

<u>IDENTIFYING INFORMATION</u>

Name, title, and grade of the subject of the investigation; and date of the investigation.

Name, title, office, and phone number of the investigator.

Name and locations of agency and organizational units involved. In a complex case, provide a copy of the organization chart and identify the placement of the subject and witnesses on the chart.

IDENTIFICATION OF ALLEGATIONS

Describe the source of the allegation, i.e., whistleblower complaint, audit of records, management initiated. Describe in detail the various allegations which were accepted by the agency for investigation. Describe any new allegations that surfaced during the investigation.

REPORT REQUIREMENTS

The report should document the relationship between the exhibits and the allegations investigated. The report should be written in a clear concise manner. **The report should tell a story of what it append, who was involved, when and where it happened and why it happened.**

Investigators should refrain from drawing conclusions on the merits of the allegations. Investigators are exposed to information during the

investigation which may not be incorporated in the investigative file, but nevertheless could bias the investigator relative to any analysis of the allegations and could **improperly influence the decision maker.**

EXHIBITS/EVIDENCE

Prepare a list of the exhibits included in the report. The list should show the page number in the report in which the exhibit is first introduced.

The exhibits should be placed in the file in the order they are referenced in the report. Each page of a sworn statement should be numbered in the bottom center of each paged, i.e., Page 1 of 9. Some agencies, including the Office of Inspector General, may use a stamp for the lower right bottom of each, which identifies the exhibit number as well as the page number, i.e., Exhibit 10, Page 1 of 9.

Exhibit all relevant evidence in the file that proves or disproves the allegations. Do not assume that the decision-maker has access to the rules, regulations, policies or procedures allegedly being violated, such as merit promotion plans or travel regulations. **If someone gives a statement naming another person as having information relevant to the allegation, get a statement from that person. Follow-up as necessary until sufficient testimony is in the record to assist the decision-maker in making a determination.**

April 16, 2006

J. Douglas Sunseri
Attorney
Nichaud, Susnseri, and Fradella
3000 18th Street
Metairie, LA 70002

RE: Donald R. Lewis

Dear Mr. Sunseri

This letter is for use in the case of Donald R. Lewis. I am the former Director of the National Finanace Center (NFC), Office of the Chief Financial Officer, U.S. Department of Agriculture. I was appointed to the position in August 1997 and retired in January 2003. Prior to my coming to NFC, USDA Secretary Dan Glickman issued a Civil Rights policy on June 7, 1995, stating his commitment to an equitable and discrimination-free workplace. As part of his commitment, he appointed Pearlie S. Reed on December 12, 1996, to head a Civil Rights Action Team to develop recommendations to address the Department's Civil Rights issues and program delivery. A Listening Session was held at NFC on January 7, 1997, to provide employees an opportunity to share employment concerns. The NFC Listening Sessions revealed a great deal of underlying frustration, ill feelings, criticism, and a tremendous lack of faith in the existing administrative process in place to deal with employee concerns.

Upon arriving at NFC in August 1997, I was challenged with the task of resolving the many grievances, complaints, unfair labor practices, and concerns. The existing system was simply broken. I began efforts to change ways of thinking, restore trust, and improve the way employees relate to each other. I selected Donald R. Lewis to help me in this endeavor because of his previous work and successes in Employee Relations and Labor Relations. After in-depth discussions, I chose Mr. Lewis to develop and manage what became known as the Morale Improvement Staff, later renamed the Equal Employment Opportunity and Workforce Services Staff.

As designed by Mr. Lewis, the core functions of the Morale Improvement Staff entailed implementing management and employee morale factors, and preventing and resolving any type of workplace dispute. Mr. Lewis proved to be the right choice. He was a very innovative thinker with the personal drive to transform creative concepts into functioning programs. Under Mr.. Lewis' leadership, NFC launched the Alternate Dispute Resolution program and the Conflict Resolution and Prevention program. The prevention program included many concepts of inclusion, including Inclusion University, a voluntary, independent-study, self-paced program to educate employees on cultural diversity. Also, Mr. Lewis designed and developed a pilot EEO program to parallel that of the Equal Employment Opportunity Commission in order to expedite the processing of EEO

complaints.

Within less than 2 years, under Mr. Lewis' supervision, we changed the NFC employment environment form one characterized by extreme case backlogs, heavy case filings, confusion, and frustration to a nationally award-winning program based on an effective, innovative approach that lowered case backlogs and improved morale. The program conceived and directed by Mr. Lewis went on to win a second national award and many regional EEO awards.

For me, Mr. Lewis was always a hardworking and dedicated employee. During my tenure, Mr. Lewis reported to me directly until I selected Mr. Cyrus Lohfink as Deputy Director. From that time forward, Mr. Lewis reported to Mr. Lohfink. As his immediate and second line supervisor, I fully appreciated the long hours that Mr. Lewis worked. I frequently, but good naturedly, chastised him about needing to spend more time at home and less time at work. Intuitively, I believed that he worked more hours than he officially recorded. During the period he reported to me, my recollection is that Mr. Lewis was, with regard to annual leave, in a "use or lose" status. When I authorized for Mr. Lewis, or for that matter any other employee, the use of compensatory overtime, I was aware that if the workload prevented the employee from using this compensatory time in a specified period, that we may be liable to pay the employee for this time. I would not expect any employee not to be fairly

compensated for his labors. This was especially true for Mr. Lewis given the many demands placed upon him during this time of change.

During my tenure, Mr. Lewis always conducted himself in a professional manner. He treated me and others with dignity and respect. He was trustworthy and honest, even when it meant telling people things they didn't particularly like hearing. Never, in my presents did he use vulgar language or tell inappropriate jokes. Never did anyone attribute such behavior to Mr. Lewis. He frequently kept to himself. Being fair was one of his priorities but oftentimes a very difficult position to take. I can recall several situations in which Mr. Lewis took a very unpopular position, regardless of the controversy, either in favor of an employee or a manger that created strong resentment from the opposing party.

In my position as Director at the NFC, Mr. Lewis and I spent many hours discussing ways to help employees and to continue improving the employment environment. Through Mr. Lewis' leadership, we were able to accomplish both. Mr. Lewis has served the NFC well and I am proud to have had the opportunity to work with him.

Should you need any additional information, please do not hesitate to contact me. I can be reached at 504-782-8211.

/S/

John R. Ortego

Affidavit of Shirley B. LeBlanc

AFFIDAVIT

New Orleans, Louisiana

I, Shirley LeBlanc, being first duly sworn on oath, make the following statement freely and voluntarily to Kathryn T. Vengazo, Contractor for the Office of the Chief Financial Officer (OCFO), U.S. Department of Agriculture (USDA), knowing that this statement may be used as evidence.

My full name is Shirley B. LeBlanc. I am employed as an EEO Counselor/Dispute Resolution Specialist, GS-12, Equal Employment Opportunity and Workforce Services Staff (EEOWSS), National Finance Center (NFC), OCFO, USDA, New Orleans, Louisiana. I have been employed in this position for 7 years. I have worked for the NFC for 32 years. I have also worked in the Information Center and as a Program Analyst prior to my current position.

My current responsibilities include resolving employee-supervisor and other workplace conflicts, mediating disputes and facilitating meetings with disputants to resolve conflicts.

My supervisor is Donald R. Lewis, Chief of the EEOWSS.

I have been advised that a complaint has been received or investigation that alleges misconduct

and mismanagement by Donald R. Lewis. I was interviewed by the investigator regarding these allegations, and my testimony provided to the investigator is summarized in this affidavit.

Management Style

I consider Mr. Lewis' strengths to be his innovation. He developed the mission of the EEOWSS as a vehicle for allowing employees to vent and resolve their concerns. Mr. Lewis' weakness is his interpersonal skills.

Mr. Lewis gets the work done in a timely manner. However, he has poor management skills. He could do better if he learned how to improve his interpersonal skills and be more flexible. He also could be a better communicator. He does not seek input from employees. He is also vindictive and controlling.

I feel that I have not been treated fairly under Donald's supervision. I have always wondered and have even asked him why I have never received an outstanding rating for my performance. He has never answered the question.

In 2004, after hearing that other coworkers had received quality increases the monetary awards, again I asked Donald what it would take for me to improve my chances of getting monetary

increases. He said he would talk to me about it at a later date, but he never has. As I thought about all this past week, I remembered a statement, a coworker told me. The coworker told me that Donald Lewis said I don't need money because I don't have children and I ought to have money saved.

Also, as of date he has not given me my mid-year review for 2005. This makes me suspicious that he is trying to set me up for a less than Superior rating (I have received Superior ratings consistently since being under his "supervision"). He has never recognized my skills and according to coworkers he made negative comments like, "She doesn't handle her cases well." He has never given this feedback.

Inappropriate Conduct

I have never heard Mr. Lewis vehemently chastise other employees in the office.

I have heard Mr. Lewis make inappropriate jokes and teasing remarks in the office that are hurtful to employees, however. For example, he has criticized me in front of my coworkers about my weight. I mentioned something to Mr. Lewis about my not liking office luncheons because of comments he made about weight, for example, making references to "big people." He also teased

me about how my size appeared in a picture of the EEO Counseling Specialists. These comments about my weight are embarrassing to me and to the others in the office whom he teases about their weight.

I have not heard Mr. Lewis speak inappropriately loudly in the office. All of the staff tends to speak in loud voices. My desk is around the corner from Mr. Lewis' office. I can hear his voice from where I sit, but I cannot hear what he is saying.

However, I recall one occasion, on February 23, 2005, when I could hear Mr. Lewis' loud voice and later learned that it was Julie Nguyen that he was talking to. While I could not hear what he said, I was concerned. When Julie left Mr. Lewis' office, I recall asking her if she was OK because I could see that she had been crying.

In fairness, I should comment that Mr. Lewis has some sensitivity which was evident with a former employee who had cancer. However, he lacks sensitivity in most cases.

Mr. Lewis had never asked me to change my testimony in a statement or affidavit I was asked to prepare

Allowing Employee to Perform Work Related to Personal Business on Government Equipment and

Affidavit of Shirley B. LeBlanc

Time

I am aware that Myloc Nguyen has an outside business. I have observed Myloc working on her outside business on Government time and Government equipment. I have personally picked up flyers, work schedules and faxes from the color printer, copy machine and fax machine that are related to Myloc's outside business. I have heard that Mr. Lewis is aware that Myloc is doing this, but I do not have personal knowledge of this.

Directing Employees to Do Personal Work

On one or two occasions, Mr. Lewis has asked me to pick up gumbo for him at the cafeteria. He gave me the money to pay for the gumbo before I went to the cafeteria. Mr. Lewis has never offered to pick up food for me from the cafeteria. However, on one occasion, I recall asking Mr. Lewis for a breakfast bar (he keeps a supply in his office) and offered to pay him for it. He gave me the breakfast bar but did not ask me to pay for it.

Mr. Lewis had asked me twice to give him a ride in my car. On one occasion, he asked me to take him to a car rental agency during the workday. I clocked out upon departing the NFC facility and clocked back in upon my return. On one occasion, Mr. Lewis asked me to take him after work to a car repair facility. I took him on my way

home. On both occasions, I believe I could have told him that I was not able to drive him where he requested. Mr. Lewis has never offered me a ride in his car.

I am aware of rumors that Mr. Lewis had a former student employee do personal work for him, but I do not know any of the specifics.

Failure to Clock Out When Leaving NFC

I have heard that Mr. Lewis leaves the facility without clocking out as required. I have never witnessed this happening myself, however.

Exceeding Authority

I am not aware of Mr. Lewis attempting to contract out the agency representation function that is now handled by the Human Resources Management Staff (HRMS).

I was not aware of the settlement terms of the Cynthia Williams complaint; I only heard rumors about what happened.

Interference with Employees' Work and Performance of Duties

On August 18, 2005, Kathy Goss came to my office, near tears, and said, "My boss is trying to set me

up." I asked what she meant. She said "He gave me three cases and he knows I'll be out for my Chemo beginning next Tuesday." She walked away. It tore at my heart because (maybe Tuesday, August 16, 2005) Kathy responded to his telling me he wanted my cases "out" quickly, by saying, "I am out of work and will be here until August 23, 2005, I could take it." Mr. Lewis walked away making an inaudible statement.

I was not in the office the day that Mr. Lewis shredded the survey documents that Kathy Goss conducted.

Mr. Lewis does not allow us to go to HRMS. He is not as strict about that now as he used to be.

When he worked here, Alger Taylor had no assigned work to do. I do not know the specifics of the situation. I once asked Mr. Lewis to get Alger Taylor to help with my leave program. Mr. Lewis refused my request and said that Mr. Taylor could not do that work and would probably mess it up.

Failure to Keep Employees Informed

Mr. Lewis has only held approximately four staff meetings since he has been here. I am not included in Mr. Lewis' "inner sanctum" of confidantes, so I don't know what is going on in the office or NFC unless I hear it from someone

else.

I have had the opportunity to review this statement consisting of four pages, and I certify that it is true and complete. I have made all necessary additions and corrections, and I have signed or initialed every page.

/s/	/s/
Shirley B. LeBlanc	Date

Subscribed and sworn to before me this /s/ day of November 2005.

/s/
Kathryn T. Vengazo, Contractor for FPMI Solutions, Inc.
Officer of the Chief Financial Officer, U.S. Department of Agriculture

LSC **Lauland Security Consultants**
3108 Cleary Avenue, Suite 212
Metairie, Louisiana 70002
(504) 454-6044

April 8, 2006

Mr. Donald Lewis
P.O. Box 29422
New Orleans, La. 70189

Dear Sir:

As per your request, I administered the Psychological Stress Evaluator, (voice lie detector) test to prove the validity of statements that you claim had been made to you and to disprove statements made against you by fellow employees at your place of employment with the U.S. Government.

After discussing the questions, supplied by you, at length, and feeling satisfied that you understood the testing procedure, the following relevant questions were asked in the test. Your answers accompany the questions.

1. Did Monique Price make a statement to you in the conference room that dark skins belong in the back of the room and the light skins belong in the

front? Answer Yes.

2. Did Adimu Kushindana say to you that since it appeared that you weren't going to leave, she was going to have to run you off? Answer Yes.
3. Did Adimu Kushindana tell you that if you followed through with Julie Nguyen being impacted by the reduction in force instead of Myloec Nguyen, that you could expect to have problems form her and other in the office? Answer Yes.
4. Did you ever tell Steven Perloff that Patricia Bachemin would never be a GS 12? Answer No.
5. Did you ever use the words bastard and motherfucker when talking to Katy Barre or Kathleen Goss? Answer No.
6. Did you ever say to anyone that you would have Julie Nguyen deported? Answer No
7. Have you ever belittled Ms. Kushindana's credentials? Answer No.

Based on the results of the test, it is my professional opinion as a court recognized expert in the field of voice lie detection, that you were truthful in your answers.

It is unfortunate that people have such viciousness within themselves as to try and ruin an individual's career. Fortunately there are such devices as lie detectors that can help to reveal the truth and

cause the fabricators of lies to suffer the consequences of their deceitful acts.

If I may be of any further assistance, please feel free to call me at my office.
Thank you for choosing my services in this sensitive matter.

Sincerely

/s/
Dr. Ronald Lauland DSH
CSAI, CSA, CRE

LSC **Lauland Security Consultants**
3108 Cleary Avenue, Suite 212
Metairie, Louisiana 70002
(504) 454-6044

April 13, 2006

Mr. Donald Lewis
P.O. Box 29422
New Orleans, LA. 70189

Dear Sir:

As per your request, I again administered the Psychological Stress Evaluator, (voice lie detector) test to prove the validity of statements made against you by fellow employees at your place of employment with the U.S. Government.

On previous test, there were 7 relevant questions asked and from the charts of that test there was no question in my mind that you were telling the truth.

The following is a list of questions asked on this date. Your answers accompany the questions

1. Did you ever direct a subordinate employee to perform personal work or errands for you while on government time and or with government equipment? Answer No.
2. Did you put forth the effort to accommodate student employees who worked on the workforce service? Answer Yes.
3. Did you ever make Patricia Bachemin give Myloc Nguyen a superior rating for special emphasis program? Answer No.
4. Did you ever ask Myloc Nguyen to allow you to store furniture at her house? Answer No.
5. Did Virginia Gaye Cooke ever send you a position description to sign for Patricia Bachemin that was not accurate? Answer Yes.
6. Did you ever go to lunch with any contract investigator? Answer No.

Based on the results of the test it is my professional opinion as a court recognized expert in the filed of voice lie detection that you were truthful on all your answers.

After testing you for the second time, with a different set of questions, and finding that you continue to be truthful on all your answers, I feel compelled to make the following remark. It is

indeed a shame that a person, working for our government, has to experience such an ordeal, and at his own expense prove that he is facing a vicious force of dishonest attacks.

Fortunately there are such devices as lie detectors and capable examiners to hopefully eliminate such behavior. I wish you the very best in your fight to preserve both your position and reputation.

Thank you for using my services in this sensitive matter.

Sincerely

/s/
Ronald Lauland, DSH
CSAI, CSA, CRE

3108 Clearly Ave
Suite 212
Metairie, La. 70002
504-154-6044 Fax 504-366-2193

Ronald Lauland

2004 - Bridge City Correction for Youth Investigator, Project Zero Tolerance, Investigator, Project Zero Tolerance, Rank of Captain

Experience 1974-2005 Lauland Security and Hypnotherapy

Owner

- Stress Analyst Instructor
- Court recognized expert in Hypnosis
- Stress Analyst Instructor
- Conducted investigations and surveillance in both civil and criminal matters for approximately 25 years

1971-1974 Hibernia National Bank
New Orleans, La.

Director of Security

- Supervised the entire security system and personnel
- Established the first inter banking system of simultaneously faxing security alerts to all banks in the system
- Wrote the first security manual for banks in New Orleans

1968-1971 Jefferson Parish Sheriff's Office
Lieutenant

- Revamped hiring procedures resulting in obtaining quality personnel
- Established helicopter flight program. Was the first JP pilot
- Attended Police Helicopter Administration, California State College, 1972
- Supervised and managed both public and community relations
- Attended and completed F.B.I. Administration course, New Orleans

1957- 1968 New Orleans Police Department
Police Officer

- Motorcycle Officer, Accident Investigator and Community Relations Detective
- Cited as one of the two top police officers by Superintendent Joseph I. Giarrusso
- Court recognized expert in the field of Accident Investigation
- Attended and completed Police Community Relations Course, Texas A&M
- Attended and completed Two summer courses of Police Community Relations courses, Michigan State University
- One of the first team of 6 police officers chosen to handle race

relations in New Orleans

Education 1968-1970 Loyola Law School
New Orleans, La.
- Completed 2 years of law
- 1963-1968 Loyola University
New Orleans, La.
Graduated, BA Cum Laude, Criminal Justice
- 1981-1982 Academy of Clinical Hypnosis
New Orleans, La.
-2003-2004 St. John's University
Springfield, La.
- Masters Degree in Hypnotherapy and Spiritual Healing
- Graduated Cum Laude
- 2005 Doctor of Spiritual Healing and Hypnotherapy
- Graduated Cum Laude

Interests Fishing, Carpentry and Education

College Memberships And Achievements

Founded the first police fraternity, The Flaming Shield, at Loyola University

President, Student Council, Loyola University

President, Evening Division Student Committee, Loyola University

President, Social Service Organization, Loyola University

President, Social Service Organization, Loyola University

President Cross Keys National Honor Fraternity

Member, Who's Who in Colleges and Universities

Member, Blue Key National Honor Fraternity

Member, Alpha Sigma Nu National Honor Fraternity

Present Membership

Past master of Masonic Lodge, Euclid # 394. Present member of Masonic Lodge, Perfect Union, Masonic Consistory and Jerusalem Temple Shrine

International Society of Street Analyst

Louisiana Hypnotherapy Association

National Rifle, Association, Life member

Member G.C.C.A.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

70 M.S.P.R. 584
Docket Number PH-0752-95-0388-I-1
CECIL MASON, Appellant,
v.
DEPARTMENT OF THE NAVY, Agency.
Date 4, 1996
M. Jefferson Euchler, Esquire, Virginia Beach, Virginia, for the appellant.
Toni Auen, Yorktown Virginia, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Antonio C. Amador, Member

Member Amador issues a dissenting opinion.

OPINION AND ORDER

The appellant has petitioned for review of an initial decision that mitigated his 60-day suspension to a 30-day suspension. For the reasons set forth below, we GRANT the appellant's petition for review under 5 U.S.C. § 7701(e) and REVERSE the initial decision; the agency's action is NOT SUSTAINED.

BACKGROUND

The appellant petitioned for appeal from the agency's action suspending him for 60 days from the position of Motor Vehicle Safety Inspector, GS-6, at the Naval Weapons Station in Yorktown, Virginia. See Initial Appeal File (IAF), Tab1; Tab3, Subtab 4a. The agency based its action on a charge of improper and unacceptable conduct at the workplace. It alleged that the appellant had uttered racial slurs in the presence of three employees from the Carroll Trucking Company ("Carroll"), and that an agency employee had stated that the appellant had made racial slurs against other agency employees and had also told sexual jokes at the workplace. See id., Tab3, Subtab 4c. The deciding official mitigated the proposed penalty of removal to a 60-day suspension. See id., Tab 3, Subtab 4b.

The appellant denied the charge and questioned the reasonableness of the agency's penalty selection; he also contended that the agency had committed harmful procedural error in that the lack of specificity of the charge had prevented him from making a sufficient reply or mounting an effective defense. See id., Tabs 11, 14. He also raised as affirmative defenses claims that the agency's action was the result of race discrimination and that it had taken the action in reprisal for his whistleblowing activities (reporting safety violations on several trucks operated by Carroll). See id.

After a hearing, the administrative judge mitigated the penalty to a 30-day suspension. See Initial Decision (I.D.) At 1-14. He found that the appellant's claim of harmful procedural error failed because the agency's notice of the charge and to prepare an informed reply. See id. At 3-4. After reviewing the hearing record and making various credibility findings, the administrative judge further determined that the agency had proven its charge by preponderant evidence. See id. At 4-10. In addition, he found that the appellant had not established his affirmative defenses of race discrimination and whistleblower reprisal. See id. At 10-12. Finally, he concluded that discipline for the sustained misconduct promoted the efficiency of the service but that the maximum reasonable penalty was a 30-day suspension. See id. at 12-14. The appellant has petitioned for review of the initial decision, and the agency has responded in opposition to the petition for review. See Petition for Review File (PFRF). Tabs 1,3.

ANALYSIS

Fundamental due process requires that notice of charges against an employee be sufficiently detailed to provide a meaningful opportunity to be heard. See Barresi v. U.S. Postal Service, 65 M.S.P.R. 656, 666 (1994), citing Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970). In analyzing a claim of denial of due process, the Board will examine, among other things, whether lack of specificity in the notice affected the appellant

detrimentally or caused him any surprise during the hearing. See Ragolia v. U.S. Postal Service, 52 M.S.P.R. 295, 302, aff'd, 983 f.2d 1086 (Fed. Cir. 1992) (Table). On petition for review, the appellant argues that the agency's notice of the charge against him was not specific enough to permit him to defend himself adequately, contending that the notice did not describe the circumstances under which the alleged comments were made (time, place, etc.). See PFRF, Tab 1 at 4-8. For the reasons set forth below, we agree with the appellant and find that the lack of specificity regarding the time and place of the charged misconduct denied him due process.

The agency's notice of proposed removal charged the appellant with improper and unacceptable conduct at the workplace and specifically referred to racial slurs made to three Carroll employees. Although it identified the type of misconduct with which the appellant was charged, the notice did not give any indication of when or where this misconduct allegedly occurred. See IAF, Tab 3, Subtab 4c. During the processing of the appeal, the appellant initiated discovery and submitted an interrogatory seeking information regarding the date, time, and location of each instance of alleged misconduct; he later filed a motion to compel, among other things, the agency's response to that interrogatory. See id., Tabs 6, 9. The administrative judge held a May 23, 1995 prehearing conference on the appellant's motion to compel. With respect to the

interrogatory concerning the date, time, and location of the charged misconduct, he noted the statement of the agency's representative during the conference that the agency had no such information. Finding this a complete answer to the interrogatory, he denied the appellant's motion to compel on that point. See id., Tab 10.

At the hearing, the agency presented testimony from the three Carroll employees mentioned in the notice of proposed removal. Each testified that, on one occasion, the appellant had made racist remarks to them. In one case, the remarks were made in 1991, while in the other cases the remarks were made in 1992. Two witnesses stated that they believed that other employees were present when the remarks were made but could not remember the names of those employees. See I.D. at 5-6; Hearing Tapes (H.T.), Side 1A, Testimony of Charles Graham, Luis Cosme, and Ellen Molchan. The appellant presented testimony from a Carroll employee, two agency employees, and two former agency employees; they reported that they had never heard him make racist remarks during their interaction with him at work. See I.D. at 7; H.T., Sides 1B, 2A, Testimony of James Rhodes, Katherine Johnson, Alice Altizer, Terry Hyatt, and Raymond Eutsler. The administrative judge concluded that the appellant's witnesses had not refuted the testimony of the agency's witnesses because the testimony of the former showed at most only that they had not themselves been subjected to

racially offensive comments by the appellant and that they were unaware that he had made such comments to others. See I.D. at 8.

As the administrative judge properly found, see id. at 4, the agency's notice provided enough detail regarding the kind of misconduct charged (racial slurs), but it did not indicate when or where the charged misconduct took place. The appellant tried to learn these facts through discovery but was informed that the agency had no such information. At the hearing, however, he heard from the agency's witnesses that the charged misconduct had allegedly occurred three to four years earlier. The lack of specificity in the agency's notice thus clearly caused the appellant surprise at the hearing and affected him detrimentally because he could not obtain any information regarding the time and location of the charged misconduct until the agency's witnesses offered details on those matters at the hearing. As the appellant rightly complains, see PFRF, Tab 1 at 5, receipt of more specific information about the time and location of the alleged incidents would perhaps have allowed him to determine whether he was working on the dates in question and whether there were any other individuals who appellant had no alternative but to present a very general defense through his witnesses, a defense which the administrative judge rejected as insufficient to rebut the testimony of the agency's witnesses.

Under the circumstances of this case, then, we find that the agency's failure to give the appellant adequately detailed notice prior to the hearing of the alleged misconduct prejudiced his ability to mount a meaningful defense and denied him due process. See Barresi, 65 M.S.P.R. at 666; Ragolia, 52 M.S.P.R. at 302. Such a denial of an employee's right to fundamental due process requires reversal of an agency's action. See Daniel v. Department of Veterans Affairs, 68 M.S.P.R. 459, 461-62 (1995); Barresi, 65 M.S.P.R. at 666-67. We therefore reverse the agency's suspension of the appellant.

ORDER

We ORDER the agency to cancel the appellant's suspension and to restore the appellant effective March 20, 1995. See Kerr v. National Endowment for the Arts, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply.

If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it had fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compli8ance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.
This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT REGARDING FEES

You may be entitled to be reimbursed by the agency for your reasonable attorney fees and costs. To be reimbursed, you must meet the criteria set out at 5 U.S.C. §§7701(g) or 1221(g), and 5 C.F.R. § 1201.37 (a). If you believe you meet these criteria, you must file a motion for attorney fees

WITHIN 35 CALENDAR DAYS OF THE DATE OF THIS DECISION. Your attorney fee motion must be filed with the regional office of field office that issued the initial decision on your appeal.

NOTICE TO APPELLANT

You have the right to request further review of the Board's final decision in your appeal

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. See 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should submit your request tot he EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your

discrimination claims and your other claims in an appropriate United States district court. See 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by your personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(2). If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, y9ou may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. See 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you chose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. See 5 U.S.C. §§ 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place,
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this

order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

For the Board
Robert E. Taylor, Clerk
Washington, D.C.

85 FMSR 5214

Edmound C. Broussard v. Department of the Navy
U.S. Merit Systems Protection Board
SF07528411112(05/01/85); 27 mspr 382
May 1, 1985
Related Index Numbers

37.00312 Discipline, Determination of Penalty, Prior Work Record
37.0034 Discipline, Determination of Penalty, Mitigating Circumstances
37.0035 Discipline, Determination of Penalty, Adequacy of Alternative Sanctions
37.051 Discipline Form of Discipline
39.025 Dishonesty, Intent
73.012 Negligence and Carelessness, Discipline

Case Summary

The Board found that although employees have an obligation to review the accuracy of their paychecks and the leave-and-earnings statements provided to them, the evidence presented showed that appellant was not removed for any intentional wrongdoing, and that he was instead removed for his negligent failure to monitor his paychecks and leave-and-earnings statements. The maximum reasonable penalty was a 20-day suspension.

The Board found that although employees have an obligation to review the accuracy of their

paychecks and the leave-and-earnings statements which their agencies provide to them, the appellant was not removed for any intentional wrongdoing, but was instead removed for his negligent failure to monitor his paychecks and leave-and-earnings statements. The Board found that a reasonably careful review of the statements would have revealed to appellant that he had been overpaid nearly $1,500 and that his annual and sick leave balances were incorrect. Therefore, the Board concluded that the removal penalty was not warranted. The Board considered appellant's past work record, the extent of time over which the occurrences took place, and the amount of the overpayment in concluding that the maximum reasonable penalty was a 20-day suspension. The initial decision was reversed.

Full Text

OPINION AND ORDER

The appellant was removed from his position of Sheetmetal Mechanic on charges related to certain irregularities in his pay and leave accounts during 1981 and 1983. A presiding official of the Board's San Francisco Regional Office reversed the action, an the agency has petitioned for review of the presiding official's initial decision. For the reasons stated below, the petition is GRANTED, 5 U.S.C. 7701(e)(1).

The record shows that the appellant's removal was

proposed after the agency had received a payroll audit report and the report of an agency investigation. These reports indicated that all 32 employees in the appellant's organizational unit 1 had received payment for overtime work they had not performed, credit for leave they had used, or both 2. According to the audit report, some of the payroll transactions under which these irregularities occurred appeared to be fraudulent, and others were "highly suspect" Agency file, tab C at 3. The irregularities in the appellant's pay and leave records were described in portions of the audit reports which dealt with "fraudulent timecards," agency file, tab C at 3-4, and "apparent fraud, "*id.* at 8; agency file, tab D at 11-12. Despite this apparent belief that the appellant was engaged in intentional misconduct, however, the appellant was charged only with "receipt of wages which [he] did not earn and credit for leave which should have been deducted from [his] leave accounts and...failure to report the overpayments to any proper authority." Agency file, tab G at 1.

In his initial decision, the presiding official found that the agency had failed to present adequate evidence of the appellant's obligation to report overpayments; that it had failed to present evidence that the appellant had been notified that he could be disciplined if he did not report those overpayments; that his leave-and-earnings statements; and that, "aside from inadequate circumstantial evidence, [it had] failed to present any evidence on the element of intent." Initial

decision at 4. The charge against the appellant therefore was not sustained. *Id.*

The agency, in its petition for review, argues that "[t]his was not an isolated case of one or two individuals who received a small overpayment through incorrect but innocent processing"; that the agency was faced instead with "a sizeable and deliberate effort to fraudulently obtain and convert to personal use agency funds"; that a statement that the overpayments were discovered during and investigation into fraud and conspiracy was included in the proposal notice; and the "the disciplinary action involved was meant to convey to all employees the serious nature of such unlawful activities and...to prevent it from reoccurring [sic]." Petition for review at 2, 3. It alleges further that, although the appellant "was not charged with the actual falsification on the time cards or conspiring with the payroll clerk, he was charged with being the recipient or beneficiary of the overpayments which were the result of falsification of the time cards, and failing to report the overpayment to any proper authority as would be expected of any honest employee." Petition for review at 5. In addition, it contends that, although the appellant testified at the hearing that he was unaware of the irregularities because he never reviewed his leave-and-earnings statements, this testimony was contradicted by other statements showing that he did verify the accuracy of his paychecks. Petition for review at 3-4.

We do not find these arguments persuasive. As the agency acknowledges, the appellant was not charged with conspiracy or falsification of time cards. 3 He also was not charged with intentionally failing to report irregularities of which he was aware. See agency file, tab G. Furthermore, even if the appellant had been charged with intentional wrongdoing, the agency official who decided to remove the appellant supported his decision to sustain the charge with the following statement:

Whether these overpayments were caused by any conspiratorial acts or were errors on the part of the payroll clerk was not an issue central to my decision. Nor was the issue as to whether your failure to report the overpayments was an intentional or negligent act on your part. An analysis of the payroll audits revealed that you reasonably could have been expected to be aware of the overpayment due to the magnitude or nature of the overpayment. It is the employee's obligation to monitor their paychecks and leave and earnings statements to the extent that overpayments would be recognized and to report such suspected overpayments. I find that you have failed to meet your obligation in this case.

Agency file, tab J at 1. This statement indicates that the appellant was not removed for any intentional wrongdoing, and that he instead was removed for his negligent failure to monitor his paychecks and leave-and-earnings statements.

The agency also takes exception to the presiding official's finding that it had failed to present adequate evidence of the appellant's obligation to report overpayments. It alleges that an employee's review of the accuracy of his paychecks, and of his leave-and-earnings statements. Is expected by and owed to his employer; that the employee's obligation to do so is stated on the back of the leave-and-earnings statement;4 and that 18 U.S.C. 643 and chapter 735 of the Federal Personnel Manual require employees to return overpayments to their employing agencies.

We agree that employees have an obligation to review the accuracy of their paychecks and of the leave-and-earnings statements which their agencies provide to them, and that they have an obligation to report errors which they discover in the wages paid or in the leave which is deducted from their leave accounts. Not only is this obligation stated on the leave-and-earnings statement itself, but it appears obvious that a primary purpose of providing employees with these statements is to inform employees of the manner in which their net pay and leave balances have been computed, so that they can detect any errors in these computations. In addition, we find no proper basis for a conclusion that employees may relieve themselves of this responsibility by arranging to have their leave-and-earnings statements mailed to addresses at which

they do not reside.

It is undisputed that the appellant received his leave-and-earnings statements along with his paychecks in 1981, and that in 1983 those statements were mailed to an address designated by the appellant. The appellant's failure to review these statements and report the irregularities described above therefore constitutes a failure to fulfill an obligation he owed to his employing agency. A reasonably careful review of the statements would have revealed to him that he had been overpaid nearly $1,500 and that his annual and sick leave balances were incorrect. Nonetheless, we find that the large amount of overtime appellant worked, and the fact that the number of hours worked varied from pay period to pay period support a conclusion that appellant's actions or inactions were merely negligent and not intentional. We find, therefore, that disciplinary action was warranted. Removal for an unintentional failure of this nature however, clearly exceeds the limits of reasonableness and both the severity of the penalty and the nature of the agency's allegations indicate that the agency improperly considered the charge against the appellant to include the element of intent; we therefore have reviewed relevant factors in this case to determine the maximum reasonable penalty for the charge sustained by the agency. *See Douglas v. Veterans Administration*, 5 MSPB 313, 331-33 (1981).

The record shows that the appellant had no disciplinary record prior to his removal; that he was employed by the agency for 17 years; and that his recent work record appears to have been at least satisfactory. On the other hand, it also shows that the charges against the appellant cover two pay periods in 1981 and several pay periods in 1983; that the appellant has testified that he never reviewed his leave-and-earnings statements during those years; and that his inaction on his part caused the agency to lose a fairly substantial amount of funds. In light of these factors, we find that the maximum reasonable penalty for the sustained offense is a suspension of 20 calendar days.

Accordingly, we hereby REVERSE the initial decision in this case; SUSTAIN the charge against the appellant; and ORDER the agency to cancel the appellant's removal, to substitute in its place a 20-day suspension, to award back pay and benefits in accordance with 5 C.F.R. 550.805, and to submit proof of compliance with this order to the Board's Office of the Clerk within twenty (30) days of the date of issuance of this opinion and order. Any petition for enforcement of this order shall be made to the Board's San Francisco Regional Office. 5 C.F.R. 1201.181(a).

This is the final decision of the Merit Systems Protection Board in this appeal. 5 C.F.R. 1201.113(c).

The appellant is hereby notified of the right under 5 U.S.C. 7703 to seek judicial review, if the court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

1 Petitions for review in the cases of two of this appellant's coworkers are the subject of separate orders issued by the Board. *Ford v. Department of the Navy,* MSPB Docket No. SF0-7528411110 (May 1, 1985): *Gaines v. Department of the Navy,* MSPB Docket No. SF07528411092 (May 1, 1985).

2 The total amounts of leave and pay are not entirely clear. One audit report included a statement that from October 1982 until June 25, 1983, the employees received unearned payments of $29,217.62 and credit for 426 hours of leave that they had used. Agency file, tab C at 2. Another audit report indicated that further leave and pay irregularities occurred, resulting in additional cost to the agency, *id.*, tab D at 2

3 Although the notice by which the appellant's removal was proposed includes a statement that information regarding the irregularities in the appellant's pay and leave was "discovered during payroll audits and investigations into a suspected conspiracy...to fraudulently pay wages...," agency

file, tab G at 1, we find that this statement was not sufficient to put the appellant on notice that he could be held responsible for the alleged conspiracy or fraud.

4 The presiding official referred to the notice on the back of the statement as "small print." Initial decision at 3. As the agency has indicated, however, this print is no smaller than that used elsewhere on the statement.

Cases Cited

5 MSPB 313
5 MSPR 280
81 FMSR 7037

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Affidavit of Patricia W. Dunvernay

AFFIDAVIT

New Orleans, Louisiana

I, Patricia Duvernay, being first duly sworn on oath, make the following statement freely and voluntarily to Kathryn T. Vengazo, Contractor for the Office of the Chief Financial Officer (OCFO), U.S. Department of Agriculture (USDA), knowing that this statement may be used as evidence.

My full name is Patricia W. Duvemay. I am employed as an Equal Employment Specialist, Equal Employment Opportunity and Workforce Services Staff (EEOWSS), National Finance Center (NFC), OCFO, USDA, New Orleans, Louisiana. I have been employed in this position from August 2003 to the present. I was officially reassigned to this position in June of 2005; I was unofficially assigned to the position in August of 2003 due to a realignment. Immediately prior to this position, I was a Labor Relations Specialist on the former Workforce Services Staff (WSS) from August of 2001 to August of 2003. In 2003, the labor relations function was reassigned to the Human Resources Management Staff (HRMS).Immediately prior to the labor relations position, from October of 1998 to August of 2001, I was a Conflict Management Specialist on the WSS.

My current responsibilities include primary

responsibility for processing complaints for discrimination filed against the USDA Office of Civil Rights. My supervisor is Donald R. Lewis, Chief, EEOWSS.

I have been advised that a complaint has been received for investigation that alleges misconduct and mismanagement by Donald Lewis. I was interviewed by the investigator regarding those allegations on August 19, 2005, and my testimony (first draft for my review provided on December 15, 2005) provided to the investigator is summarized in this affidavit.

Management Style

I consider Mr. Lewis's strengths to be that he is extremely knowledgeable; he is quick to stop and work with an employee; he is a pusher and does not let work sit, he does not procrastinate; and he is customer oriented. He is also fair - he deals with employees who do not work and rewards employees who do work.

He runs the office like it is his own business. He is cost conscious, very creative and very fair.

I consider Mr. Lewis' weaknesses to be that he does not always communicate information to staff that he has received from the senior staff meetings that he attends.

I believe that Mr. Lewis delegates work appropriately to subordinate staff. He is able to get things done at little cost, for example, he gets training for employees at minimal cost and he gets experts to give training to management at minimal cost.

Conduct

Mr. Lewis conducts himself in a professional manner in the office. He tends to be laid back. He often jokes with employees to keep the atmosphere relaxed.

I have not heard Mr. Lewis make inappropriate jokes about religion or people's weight.

I have heard Mr. Lewis speak loudly in the office. He speaks loud in a normal voice and when excited about a specific issue he may speak even louder. There have been occasions when he has spoken loudly to me when we have been engaged in discussions pertaining to very heated or controversial topics; however, if this is a form of misconduct, I would hope NFC would launch a full-field investigation throughout NFC so that similar situations are dealt with in a similar manner. Additionally, I have personally observed similar conduct from employees on our staff.

Affidavit of Patricia W. Dunvernay

Allowing Employee to Perform Work Related to Personal Business on Government Equipment and Time

I am not aware of an EEOWSS employee being allowed to work on a private business on Government time and equipment. I have lots of work to do and hardly have time to observe what's going on in the office around me. I have never seen Myloc Nguyen working on her outside business activities while at work, for example, faxing documents, preparing and printing documents on the Government computer, making telephone calls, copying documents. I am in a separate area of the office, physically removed from the area where Myloc and others sit.

I am sure there have been times when employees, myself included, have taken a brief moment to do something personal (e.g., phone calls, copies, e-mails, etc.). However, there are written directives on this that provide examples as t what is or what's not permitted.

Directing Employees to Do Personal Work

I feel reasonably sure that Mr. Lewis has never directed anyone to do anything personal for him. I do not recall Mr. Lewis ever asking me to pick up food for him from the cafeteria. I have seen him ask other employees to do so, usually when the

employee was going to the cafeteria. I have also seen other employees within the office pick up food for each other.

I do not remember Mr. Lewis ever asking me to drive him somewhere in my car. We hardly have to occasion to leave the office; however, there have been rare occasions (e.g., office luncheons or to testify at hearings) when we may have ridden together. In these rare situations, I would have likely driven because it is my preference to drive my car or we would have both ridden with someone else.

I am not aware of Mr. Lewis directing or asking subordinate employees to perform non-Government or inappropriate work for him such as personal correspondence, his son's homework, etc.

Failure to Take Appropriate Management Action

I have heard Mr. Lewis express his opinion on sexual harassment. He is against it and has a zero tolerance for it, especially due to his position as EEO Officer.

I am aware of two recent incidents of alleged sexual harassment that occurred in our office within days of each other. I first became aware of the incident when I received a phone call from Debbie Byrne (I have no record of the date that

this occurred but I believe it was in February 2005). In any case, Ms. Byrne informed me that she had been contacted by Donald Lewis that morning regarding the incidents She asked me to give him a message to obtain statements from both Julie Nguyen and Adimu Kushindana regarding their allegations against "TL." I gave the message to Mr. Lewis. Up until this point, I had no knowledge of these incidents. I do not know TL, did not see the incidents occur, and still do not know who TL is.

I was asked if I had participated in preparing statement submitted by Julie Nguyen regarding the incidents with TL. Shortly after giving the message from Debbie Byrne to Mr. Lewis, Julie came into my office and told me she needed to give a statement regarding an incident that she reported. She asked if I could help her with her statement. It was not uncommon for Julie to come to me to ask for assistance in writing something. Julie is very knowledgeable but sometimes has difficulty conveying her thoughts in writing. I was glad to help her, as always, and especially because I have conducted several investigations as a certified misconduct investigator. She sat in the chair in front of my desk. I explained to her just to tell me what happened. I told her to be as specific as possible, citing dates when she could remember them. When she characterized TL's remarks as inappropriate I advised her to say, to the best of her recollection, exactly what he said. I

would type as she spoke, read it back to her, and she would tell me what changes she wanted to make, if any. I would type her changes. I did this a sentence at a time. I typed exactly what she said. I don't recall her statement being very long, it was precise and to the point. Upon completing, she thanked me and I immediately e-mailed the draft to her (while she was still in my office). In my e-mail message to her I told her to review carefully and to change as she felt she should (unfortunately, I did not save this message for I did not expect to need it). I have no doubt that this is what I said to her because it was my common practice to do so whenever I took a statement from someone. I did not remove anything or fail to include anything Julie said to me. She could have added/deleted anything she wanted after that I never saw Julie's statement again. She ultimately provided her statement directly to Mr. Lewis for his submission to Ms. Byrne.

This allegation that I removed information about Mr. Lewis was very disturbing to me. First, because it was never my understanding that her statement had anything to do with Mr. Lewis, I understood she was describing the events surrounding TL's contact with her. Second, if she wanted to include something about Mr. Lewis, she was free to do so; it was her statement. My only involvement was assisting, at her request, with the initial draft prepared from what she told me in my office.

Affidavit of Patricia W. Dunvernay

Nothing more, nothing less.

I would like to add that part of Mr. Lewis' unpopularity likely comes from he fact that, unlike many other managers at NFC, he does take appropriate action (e.g., dealing with poor performance, addressing misconduct in a progressive manner, etc.)

Failure to Clock Out When Leaving NFC

I have never observed Mr. Lewis leaving or entering the facility without clocking in or out as required.

Exceeding Authority

I have never observed a situation where Mr. Lewis made or approved terms to settle complaints that exceeded his authority. I should note that EEOWSS handles all workplace disputes, not just discrimination complaints.

I am aware of Mr. Lewis looking into contracting out the function of agency representation. The agency representative function must be outside of the EEOWSS and I was aware that Mr. Lewis had some recent concerns regarding his inability to obtain critical EEO information (e.g., copies of AJ decisions, EEO hearing dates/changes to dates, copies of settlement agreements, etc.) from NFC's current agency representative because I was

present during a discussion or two that he had with John White, NFC's Deputy Director (the Council of Civil Rights Directors has also included this same issue on their action agenda due to similar concerns throughout other agencies). Additionally, MD-110, expressly states that "it would be intrusive for the individual who represented the agency in an equal employment hearing to have authority to approve decisions with respect to resolution in the same or related cases. After expressing his concerns on more than one occasion, Mr. White advised Mr. Lewis to proceed in seeking the contracting out of this function. It was at this point that I actually became involved since Mr. Lewis asked that I begin researching the possibilities of doing so. I talked to Deidre Phillips in the Procurement Office to see if the function could be contracted out and to find out about the process for getting contractors. Ms. Phillips ultimately advised us that it was her interpretation that the representation function is an inherently governmental function that cannot be contracted out. After that, I never heard anymore about it.

Interference with Employees' Work and Performance of Duties

I have been asked if I am aware of Mr. Lewis interfering with any employees' work or performance of duties. I am not aware of him doing this or exactly what this means.

Affidavit of Patricia W. Dunvernay

I was asked specific questions about Alger Taylor. Mr. Lewis has had several individuals on his staff that have historically had performance issues with their previous supervisors that he has had to address upon becoming their supervisor. Mr. Lewis took a hard stance on this and would not rate someone as being successful if they did not perform their job. Because of my personnel background, I have on occasion assisted Mr. Lewis in documenting performance and/or conduct concerns. I am aware that Mr. Taylor failed to follow Mr. Lewis' instructions and ultimately proposed his removal. Mr. Lewis received official advice and guidance from a Human Resource Specialist prior to taking any of these actions. The next thing I heard was that Mr. Taylor was retiring. I never personally observed Mr. Taylor sleeping in his office but was told by Julie Nguyen that she once observed him asleep.

Mr. Lewis has never asked me to change my testimony on any statement I have been required to make. I presume he knows that I would not do so.

Failure to Keep Employees Informed

As stated above, it is not uncommon that we would hear about an upcoming event or something of interest form a co-worker in another organization before hearing about it from Mr.

Lewis. He is not always prompt in passing information on to staff that he learns at senior staff meetings he attends. I don't believe, however, that he withholds information intentionally; he's just not real good at sharing right away. There was a point in time when all employees would receive a copy of the notes from senior staff meetings, but that too was untimely.

General

Morale is not at its best throughout the NFC right now due to the fact that we are undergoing a reduction in force.
In response to the question as to whether or not I felt our office performed functions that were the responsibility of HR, I replied that our staff was established to assist all employees, including managers. There have been times when a manger will contact our office for assistance when they are unable to get in contact with their HR representative. Many issues are extremely time sensitive and a manager is not always able to wait to handle a particular situation. Our office's primary purpose is customer service so our goal is to be as responsive as possible. There were many times that I would stay late or take something home to work on in order to give the manager or employee a timely response. As such, EEOWSS will assist managers draft correspondence to employees, e.g., letters about misuse of leave, AWOL notices,

etc. This often saves the manager an enormous amount of valuable time because they can then take a draft letter to their HR specialist with most of the facts/information in hopes of preparing a final very quickly. The manager is the NFC individual with the delegated authority to take appropriate action; however, they are always advised to consult with their HR specialist for advice and guidance prior to taking any disciplinary action (because our office does not have the disciplinary background on employees to determine the appropriateness of penalties). When managers are able to obtain timely assistance from HR, there is usually no need for them to contact us for assistance; the same is true for employees. More often than not, the issues presented to EEOWSS, by nature, are some type of personnel related issue. We've even had employees/managers within HR come to us for assistance. The duties we perform clearly do not conflict with those of the Employee Relations Staff of HRMS; to the contrary, we are assisting in the process and actually saving everyone time.

Additional Comments

I have had a lot o time to think about the questions raised during this interview and would be remiss in not sharing some thoughts. I have nearly 32 years of Federal service, all which has been gained at NFC. Most of this time has been spent dealing with

personnel related issues. I have worked for many supervisors, some I would consider great, some good, and some not-so-good.. When ultimately told that I was being interviewed to address allegations of misconduct and mismanagement by my supervisor, I was stunned. Throughout my career, I have come across numerous situations of misconduct and mismanagement but I would have never thought someone would raise these types of allegations against Mr. Lewis. By no means am I inferring Mr. Lewis is perfect, but then again no one is. I have worked directly for him since October 1998. During this time, I have seen him bend over backwards to ensure employee rights are protected, which is not an easy task. For a long time, he attempted to impress upon upper management that NFC's rate of prevailing in EEO complaints did not mean we were trouble free; that NFC was engulfed in workplace conflict creating a tremendous loss in productivity. At a time when EEO complaints against NFC were at an all-time high, Mr. Lewis was selected to head a brand new organization to resolve these problems. It was Mr. Lewis' diligence that garnered him the position he now holds. With limited resources and a tremendous amount of ingenuity, persistence, and upper management support, he was able to resolve many of the problems facing NFC. He was also responsible for NFC's receipt of numerous awards.

Affidavit of Patricia W. Dunvernay

I have watched Mr. Lewis work hard to place individuals unhappy in their current work environment into organizations that better suited them even when he met resistance from some of the parties involved. As a matter of fact, he did this for two employees in our office, Lorri Clark and Julie Nguyen, who were unhappy in their previous organizations and came to him for assistance. He has always been very liberal with approving leave and advancing leave to employees who have been in need. In his position, he has had to take some very unpopular positions, sometimes with employees and sometimes with management, but always because he felt his position was the fair and impartial one. I've never known him to make a decision he was not comfortable with because it was the easier decision to make or the less controversial decision. Again, I believe that it was this type of character that earned him his current position. There are many names that come to my mind when the word "mismanagement" is used, but Donald Lewis' is not one.

I have had the opportunity to review the statement consisting of six pages, and I certify that it is true and complete. I have made all necessary additions and corrections, and I have signed or initialed every page.

/S/ January 18, 2006

Affidavit of Patricia W. Dunvernay

Patricia W. Duvernay Date

Subscribed and sworn to before me this 18th day of January 2006.

_____/S

/S/

Kathryn T. Vengazo, Contractor for FPMI Solutions, Inc.

Office of the Chief Financial Officer, U.S. Department of Agriculture

Affidavit of Patricia W. Dunvernay

April 22, 2006

Mr. J. Douglas Sunseri
3000 18th Street
Metairie, LA 70001

Dear Mr. Sunseri:

The following is being submitted to you as additional information to my affidavit for your use in representing your client, Donald R. Lewis:

Sexual Harassment

As stated in my initial affidavit, Mr. Lewis enforces a zero-tolerance policy on sexual harassment. Many supervisors rarely find themselves in a position where one of their employees report sexually harassing conduct by another employee but Mr. Lewis has been faced with three incidents since he became Chief over EEOWSS. Prior to the situation between Julie Nguyen and T.L., I am aware of two situations in which the victim of the alleged harassment, who worked for Mr. Lewis, was reluctant to pursue concerns once they conveyed them to Mr. Lewis.

One case involved Myloc Nguyen and Marcel Metz, an employee of the mailroom. Ms Nguyen

told Mr. Lewis about a recurring incident that made her feel very uncomfortable but after she told him she added that she didn't want to get him in trouble. Mr. Lewis carefully explained to her the seriousness of her allegations and told her that he had to address them. He persisted that she document the situation in writing and he proceeded to take appropriate action. Another case involved Julie Nguyen and an employee of the mailroom. When the employee's supervisor was apprised of the incident, she requested a written statement. Julie did not want to provide a statement. The supervisor contacted Mr. Lewis who, in turn, explained to Julie her need to cooperate. After much persistence and an explanation of why it was so important for her to cooperate, Mr. Lewis finally convinced Julie to provide the required statement.

In view of the above and my knowledge of the events surrounding the incident with T.L., it would be difficult to believe that Mr. Lewis failed to take appropriate action. Julie did not initially complain about T.L. saying anything that offended her, just that he was becoming a nuisance by visiting her so often. Julie insisted that Mr. Lewis not say anything to T.L. because she felt if she just began to ignore him, he would stop coming to her desk. The morning Julie told Mr. Lewis about T.L.'s inappropriate remarks, he immediately contacted Debbie Byrne to report the incident. Although I do

not know the specific date of this incident, I know it occurred sometime in early February and he reported the incident and obtained the statements on the same day.

Socializing

I have worked directly for Mr. Lewis for nearly eight years. During this time, I've known him to be a fairly distant person; definitely not someone who socializes outside of the office. A few years ago, Mr. Lewis became seriously ill and many of us in the office were very concerned. As he began to recover, he would call in daily but he would never discuss his illness or tell anyone where he was. He would only discuss work. Despite my effort to try to learn more about his family and get to know him better he has always been the type to keep to himself. That's just how he is. Even at retirement parties, he would go to show his face out of respect for the person retiring but rarely stayed long or mingled with others. He definitely does not mix his personal life with people he worked with.

As the COR for EEO investigations, I have regular dialogue with the investigators on the status of their cases, difficulties encountered, etc. I am not aware of any reasonably sure that I would have known if he had.

Inappropriate Comments

Affidavit of Patricia W. Dunvernay

Of all the current employees of EEOWSS, I've probably spent the most time with Mr. Lewis on a one-on-one basis. He's always been a "glass-is-half-full" kind of person. Often, and sometimes to my surprise, he found a way to see the best in someone even when it was believed that they were not acting in their best interest, always attempting to rationalize their bad behavior. He's very passionate about his work and what he believes in. I've seen him happy and upset. There were times when Mr. Lewis would engage in heated discussions expressing his opinion on very controversial issues brought to his attention, but that was the nature of his job. He was not afraid to take a firm position for what he believed to be the right position, regardless of whom he was in disagreement with. In all of these good and bad situations we've experienced together as co-workers or supervisor/employee, I've **never** heard Mr. Lewis use the words fat ass, bastard, or m----- f------ or any other curse word for that matter. I can't even imagine he would even think these words much less say them.

Vindictiveness

This term is clearly subjective and could be better addressed with specific examples; however, I'll do my best to respond. I am not aware of any specific acts to support the accusation of Mr. Lewis being

vindictive; however, I believe I can provide some examples that can refute this accusation.

- Mr. Lewis worked closely with three members of our staff to transfer them to EEOWSS. Each were miserable in their previous positions, could not tolerate their current employment situation, and solicited his help for a reassignment. All expressed and interest in working for Mr. Lewis. Mr. Lewis managed to facilitate non-competitive reassignments for Julie Nguyen, Adimu Kushindana, Myloc Nguyen, and Lorri Clark;
- Mr. Lewis single-handedly pursued the employment of Ms. Clark's daughter under the Student Temporary Employment Program at a time when student employment was being diminished;
- Mr. Lewis has often sacrificed scheduling time off during holidays so that all of his employees could take the time off that they requested. It often meant that he would lose some of his annual leave;
- Mr. Lewis firmly believed in giving proper performance evaluations because he thought it was imperative in order to emulate the type of performance he expected. He often was critical of supervisors who took the easy way out and evaluated an individual with known performance deficiencies as superior. In line with this, he has always believed the

importance of recognition in concert with performance and has given more and better awards to his employees than they were accustomed to receiving from previous supervisors. You knew if you worked hard and sustained that type of performance, you would be recognized; and, to the contrary, if you didn't, you knew that you wouldn't;

- Mr. Lewis had a special place in his heart for all of our student workers who performed in an exceptional manner. He always let them schedule their courses first and then worked around their schedule, even if it meant that their schedule wasn't the most conducive to our office needs;
- Mr. Lewis was always extremely compassionate with employees who needed extended periods of absence due to illness or other personal situations (e.g., Cynthia Caillet, Lorri Clark, Myloc Nguyen, Alger Taylor, and Kathy Goss). In many of these cases the employee was even remiss in following proper procedures during this time of need (e.g., failing to call him directly) but he would never let that impair his decision to do what he thought needed to be done.

Reprisal

- *Alger Taylor* - when it came to Mr. Lewis' attention that Alger was parking in a

reserved parking space without authorization, Mr. Lewis simply advised him not to park there any longer fully expecting that would be the end of it. Unfortunately, Mr. Taylor continued to park in the reserved parking space without authorization. Mr. Lewis was doing his job as a supervisor in addressing this problem and worked closely with Donna Maeder in HR to properly handle. Quite frankly, Mr. Lewis was very disappointed that Alger failed to do as instructed. He often commented how he liked Alger and that he was a real nice guy, he couldn't understand why he was being so adamant about parking in that space. As the situation continued, Mr. Lewis would follow with appropriate response. After a series of progressive disciplinary actions (e.g., letter of counseling, letter of reprimand, short suspension, long suspension), Mr. Lewis had no choice but to propose removal. This was the action that ultimately led to Alger's voluntary retirement, not performance. However, Mr. Lewis was very much aware of Alger's failure to produce viable work products and saw he did very little as supported by his weekly accomplishment reports. Julie Nguyen also had reported Alger for sleeping in his office on several occasions. Others complained that Alger would often get them to perform work he

was supposed to do (e.g., FOCUS reports). Upon receiving some EEO related work assignments from Jerry Lohfink, Mr. Lewis assigned them to Alger with specific instructions. Upon completion of one of his first assignments, Alger submitted a report that was 95% plagiarized as his own work. Mr. Lewis was one of the first supervisors to deal with Alger's performance deficiencies even though his previous supervisors were aware of them. Mr. Lewis eventually placed Alger on a PIP that included the assignment of a mentor to assist him as needed. That way , Mr. Lewis could get a handle on what he would and couldn't do and hopefully get him whatever training was needed for him to do his job (instead of having others do it for him). Mr. Lewis did not run Alger off; Alger did that to himself. Mr. Lewis provided Alger ample opportunity to correct both conduct and performance deficiencies but he chose not to do so.

- *Deployment* - I understand that there was a feeling of reprisal by others within EEOWSS when they were not deployed following the events of Hurricane Katrina. That is amazing to me. Those not deployed were able to take care of their homes and families without working and still received full payment. If anyone should feel they were treated unfairly it should be those deployed.

I had to leave my home that was in need of a tremendous amount of work, work 10-hour days doing the work of several people so that I could drive 3 1/2 hours to and from home on weekends and still have enough time to work like a dog in my house, leave my ailing 85-year old father who was difficult to handle with my husband and daughter to care for him, and leave my family who I was very close to and needed more then than ever before. I'm a little unclear as to the advantage reaped by those deployed and why those, not deployed, feel their non-deployment was reprisal. What adverse action was taken against them?

- *Displays of Inappropriate Conduct* - There were several times that I witnessed employees within EEOWSS acting disrespectful to Mr. Lewis and wondered why he did not do anything about it. Some of these situations occurred more recently and with all that has happened, I wonder if they were trying to provoke him. Sometime in February 2005, EEOWSS was sponsoring some EEO training for supervisors and managers over a 2-day period including information on How to Avoid Becoming an RMO. Julie Nguyen wanted to attended training. Mr. Lewis agreed to let her attend on one day but not both for he did not feel it was needed for her position. Julie was angry

with Mr. Lewis and felt she should be allowed to attend since she worked in EEO. In preparation for the training, Mr. Lewis assigned Julie and one of the students to go to the cafeteria and place the training material on the chairs. Julie was still angry for not being allowed to go so she refused to do this. She clearly told Mr. Lewis that she wasn't going to do this. He got angry with me when I tried to diffuse the situation and told me not to get involved. There were other times when I would observe Julie yelling at Mr. Lewis when he would ask her to prepare a report and perform an assignment, talking to him with a disrespectful tone. He would usually dismiss her attitude and simply tell her to do what he assigned her.

Upon returning to Bldg. 350 on November 14, 2005, Mr. Lewis met with the staff to discuss preliminary matters related to our return. Among them was a discussion regarding our work schedules in conjunction with our individual needs. He was trying to work within the confines of NFC requirements that would not allow people to work past dark since their was no traffic lights, streetlights, police patrolling, functioning gas stations, etc. After asking everyone their preferences, he said he would take a look and let us know by the next day what our flexibility would

be. He commented that he knew everyone had many personal issues to deal with as well and that he would do his best to accommodate everyone's needs. With that Lorri made an angry outburst against Mr. Lewis in front of the entire staff. Although we were not all aware of the specifics that she was speaking to, she commented that he was not compassionate because if he was he wouldn't have sent her the letter he sent while she was not working. I was uncomfortable with her comment and wondered why Mr. Lewis did not say anything to her for her outburst. If he were intent on reprisal, he surely would have used this situation to his advantage but he dismissed it because he felt everyone's emotions were high during this very difficult time. Lorri apparently feels a tremendous amount of anger/hatred toward Mr. Lewis although I'm not sure I understand why. There were times when I would witness her slamming things around or banking on her desk after having a discussion with him. I really like Lorri and think she is an excellent worker so I didn't want to see her get in trouble for these things. I just felt that one day it was going to blow up. So, whenever I observed this, I would go to her and try to calm her down. I would remain her that he was her supervisor and that she needed to be respectful even if she didn't like him. She would agree and eventually clam down.

Previous History

Affidavit of Patricia W. Dunvernay

Several years ago, Adimu was placed in a lower-graded position than previously held when reinstated, at NFC. Her prior experience at the higher grade was not related to the position being filled through her reinstatement. She was not happy with decision so she lodged a complaint against Mr. Turner. She made strong, unsupported allegations against John Turner and distorted many of the facts to make it look as though she had been treated unfairly, even though the facts supported otherwise.

If any additional information is needed, please do not hesitate to call me. I can be reached at 504-858-4811.

Sincerely,

/S/
Patty Duvernay

CHAPTER 751 - DISCIPLINE

APPENDIX A - USDA Guide for Disciplinary Penalties

The purpose of this Guide is to assist those responsible for disciplining employees in selecting appropriate penalties. While the Guide does not cover every possible offense, it does provide the more common types of offenses and the penalties usually assessed. Opportunities for the appropriate use of alternative discipline(see DPM Chapter 751 - Subchapter 4) may also be considered. Consistent with DPM Chapter 751 Subchapter 4, alternative discipline is available in appropriate circumstances in all cases, except when the penalty to be proposed is removal from the service or dictated by statute. Alternative discipline may also be considered when mitigating circumstances serve to reduce a proposed penalty of removal to a lesser penalty, including a suspension of letter of reprimand.

Although each case must be evaluated on its own merits, the Guide does provide a framework to assure consistent application of disciplinary penalties throughout the Department.

Before proposing or deciding on a particular penalty, agency officials should consider all the pertinent factors, including:

1. The nature and seriousness of the offense, its relation to the employee's duties, position,

and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;

2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
3. The employee's past disciplinary record;
4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
6. Consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7. Consistency of the penalty with the USDA Guide for Disciplinary Penalties;
8. The notoriety of the offense or its impact upon the reputation of the agency;
9. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
10. Potential or the employee's rehabilitation'
11. Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment,

harassment, or bad faith, malice or provocation on the part of others involved in the matter; and

12. The adequacy and effectiveness of alternative sanctions to deter such conduct In the future by the employee or others.

Not all of these factors will be pertinent in every case, and frequently in the individual case some of the pertinent factors will weigh i the employee's favor while others may not or may even constitute aggravating circumstances. Selection of an appropriate penalty must thus involve a responsible balancing of the relevant factors in the individual case.

USDA GUIDE FOR DISCIPLINARY PENALTIES		
TYPE OF MISCONDUCT	PENALTY FOR FIRST OFFENSE	PENALTY FOR SUBSEQUENT OFFENSE

1. **FISCAL IRREGULARITIES** (Penalty depends on the monetary value, position held, personal benefit, and/or other pertinent factors.)		
a. Submission of (or causing or allowing the submission of) falsely stated time logs, leave forms, travel or purchase vouchers, payroll, loan, or other fiscal document(s).	Letter of Reprimand to Removal, if for administrative convenience or to avoid following required procedures.	Removal
	14-Day Suspension, if it results in personal benefit to another.	Removal

	Removal, if it results in personal benefit.	
B. Unauthorized and/or improper use of property, Government or other or other funds, or any other thing of value coming into an employee's custody as a result of employment.	14-Day Suspension to Removal	Removal
c. Failure to properly account for or make proper distribution of any property, Government or other funds, or any other thing of value coming into an employee's custody as a result of employment.	Letter of Reprimand to Removal	Removal

d. Concealment of (or failing to report) missing, lost, or misappropriated funds, or other fiscal irregularities	Letter o Reprimand to Removal	14-Day Suspensio n to Removal
2. FALSE STATEMENT(S)/INC ORRECT OFFICIAL DOCUMENTS (false statements r entries in connection with fiscal matters and documents are covered in 1. above.)		

a. Deliberate falsification of an application for employment (SF-171), or other personal history record by omission or by making a false entry. Note: If an incorrect or inaccurate entry or statement is determined to be unintentional, other (non-disciplinary) action should be taken.	Removal, if it would have adversely affected selection for appointment or promotion.	
	Letter of Reprimand to 14-Day Suspension, if it would not have adversely affected selection for appointment or promotion.	14-Day Suspension to Removal

b. Misrepresentation, falsification, or concealment of material facts or documents in connection with an official matter, including an investigation.	Letter of Reprimand to Removal	Removal
c. Knowingly and willfully making an incorrect entry on an official document or approving an incorrect official document.	Letter of Reprimand to Removal	14-Day Suspension to Removal
3. CONDUCT PREJUDICIAL TO THE BEST INTERESTS OF THE SERVICE		

a. Conduct which causes the employee to be indicted or charged with a criminal offense which is related directly to the duties of the employee's position or the mission of the Agency and for which a sentence of imprisonment may be imposed.	Indefinite Suspension (Unit the outcome of the legal action is known and/or until the completion of appropriate administrative action.)	
b. Conduct which causes the employee to be convicted of a criminal charge which is related directly to the duties of the employee's position or the mission of the Agency.	Removal	

c. Off duty conduct which adversely affects the employee's job performance or trustworthiness, or adversely affects the ability of the Agency to accomplish its mission.	Letter of Reprimand to Removal	Removal
d. Infamous or notoriously disgraceful conduct.	Removal	
e. Concealing, removing, mutilating, altering or destroying Government records.	Letter of Reprimand to Removal	14-Day Suspension to Removal
f. Malicious or intentional damage or loss of Government-owned or Government-leased property.	Letter of Reprimand to Removal	14-Day Suspension to Removal
g. Using public office for private gain.	14-Day Suspension to Removal	Removal

h. Unethical or improper use of official authority or credentials.	Letter of Reprimand to Removal	Removal
i. Unauthorized disclosure or use of (or failure to safeguard) information protected by the Privacy Act or other official, sensitive, or confidential information.	Letter of Reprimand to Removal	Removal

j. Having a direct or indirect financial interest that an employee could reasonably expect to be in conflict or appear to be in conflict with his or her official duties and responsibilities. (When a conflict of financial Interest occurs that is inadvertent and that could not be reasonably anticipated by the employee, the situation would normally be handled by divestiture or recusation rather than disciplinary act action section.)	Letter of Reprimand to Removal	Removal
k. Engaging in outside employment or other activities without required prior approval.	Letter of Reprimand to 5-Day Suspension	14-Day Suspension to Removal

l. Improperly soliciting or accepting, directly or indirectly, a gift from any individual or establishment seeking or having a contractual or business relationship with the Department.	5-Day Suspension to Removal	Removal
m. Improperly soliciting a contribution from another employee for a gift to a official superior, making a donation as a gift to an official superior, or accepting a gift from an employee receiving less pay.	Letter of Reprimand to Removal	Removal

n. Borrowing money from a subordinate employee, securing a subordinate's endorsement on a loan, or otherwise having a subordinate assume the responsibility financial of a superior.	Letter of Reprimand to Removal	Removal
o. Use of (or authorizing, the use of)employees, or Government owned, leased or provided property, facilities, services or credit cards, for inappropriate or non-official purposes.	Letter of Reprimand to Removal	5-Day Suspension to Removal

p. Willful use of (or authorizing the use of) any Government-owned or Government-leased passenger vehicles or aircraft for other than official purposes.	30-Day Suspension to Removal [31 U.S.C. 1349 (b) mandates a minimum penalty of a one month suspension for unofficial use of Governme nt passenger carrying vehicles or aircraft.]	Removal

q. Use of (or authorizing the use of) other Government-owned or Government-leased vehicles such as trucks, aircraft, boats or other motor vehicles for other than official purposes.	30-Day Suspension to Removal	Removal
r. Carrying of unauthorized passengers in Government-owned or Government-leased vehicles such as trucks, aircraft, boats, or other motor vehicles for other than official purposes.	Letter of Reprimand to 14-Day Suspension	14-Day Suspension to Removal

s. Unauthorized use, removal or possession of a thing of value belonging to another employee or private citizen.	Letter Reprimand to Removal	Removal
t. Fighting, threatening, attempting to inflict or inflicting bodily harm while on Government premises and/or when in a duty status	5-Day Suspension to Removal	14-Day Suspension to Removal
u. Use of abusive, offensive, unprofessional, distracting, or incitory (goading) language, gestures, or other conduct; quarreling,; creating a disturbance or disruption; or horseplay.	Letter of Reprimand to 14-Day Suspension	5-Day Suspension to Removal

v. Use of slanderous, malicious, derogatory, discourteous, or otherwise inappropriate language, gestures, or other conduct toward employees, supervisors, or the public.	Letter of Reprimand to Removal	5-Day Suspension to Removal
w. Failure to pay just debts in a timely and proper manner.	Letter of Reprimand to 14-Day Suspension	1-Day Suspension to Removal
x. Gambling on duty or in work areas.	Letter of Reprimand to Removal	Removal
y. Participating in a strike, work stoppage, slowdown, sickout, or similar activity.	Removal	
4. FAILURE/REFUSAL TO FOLLOW INSTRUCTION		

a. Negligence, including the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions.	Letter of Reprimand to 14-Day Suspension	5-Day Suspension to Removal
b. Deliberate or malicious refusal to comply with rules, regulations, written procedures, or proper supervisory instructions.	Letter of Reprimand to Removal	14-Day Suspension to Removal

c. Refusal to provide information to authorized representatives of the Department or other Government Agencies when called upon, when the inquiry relates to official matters and the information is obtained in the course of employment or as the result of relationships incident to such employment.	Letter of Reprimand to Removal	Removal
d. Failure to report for duty as detailed, transferred, or reassigned.	Removal	
e. Failure to submit required statements of financial interests and outside employment.	Letter of Reprimand to 3-Day Suspension	5-Day Suspension to Removal

5. NEGLECT OF DUTY		
Careless/negligent work, loafing, sleeping on duty, wasting time, conducting personal business while on duty.	Letter of Reprimand to Removal	5-Day Suspension to Removal
6. ATTENDANCE-RELATED OFFENSES(Penalty will depend on the circumstances, including length, frequency, and nature of position. To support disciplinary action, tardiness and unauthorized absences from the work place must be charged to AWOL on the employee's Time and Attendance Report.)		

a. Unexcused tardiness, including delay in: (1) reporting at the scheduled starting time, (2) returning from lunch or break periods, and (3) returning from an authorized absence from the work station.	Letter of Reprimand to 1-Day Suspension	5-Day Suspension to Removal

b. Unauthorized absence, including leaving the work-station without permission or before the end of the workday. [Time periods at right refer to the accumulated total amount of AWOL for each offense (i.e., disciplinary action proposed) rather than for each instance or occurrence of unauthorized absence. For example, if an employee is AWOL on three separate occasions and the total amount of AWOL shown on the T&As is more than 8 hours but less than 5 workdays, the proposed penalty for a first offense would normally be a suspension of from 1to 14-Days	Absences of 8 Hours or Less	Absences of 8 Hours or Less

	Letter of Reprimand to 5-Day Suspension	5-Day Suspension to Removal
	Absences of More Than 8 Hours But Less Than 5 Workdays	Absences of More Than 8 Hours But Less Than 5 Workdays
	1-Day Suspension to 14-Day Suspension	14-Day Suspension to Removal
	Absences of 5 Work Days or More	Absences of 5 Work Days or More
	14-Day Suspension to Removal	Removal
7. INTOXICANTS- Alcohol and Spirits(Agencies must assure the requirements of alcohol abuse programs are met before taking action.)		

a. Unauthorized use of intoxicants while on duty, on Government property or Government-controlled property or premises where official duties are performed.	Letter of Reprimand to 14-Day Suspension	30-Day Suspension to Removal
b. Reporting to or being on duty while under he influence of intoxicants.	Letter of Reprimand to 30-Day Suspension	30-Day Suspension to Removal

c. Operating a Government-owned or Government-leased vehicle (or privately-owned vehicle on official business) while under the influence of intoxicants.	Removal [If a penalty of less than removal is determined to be appropriate, agencies should (at a minimum) suspend the employee's official driving privileges for a period of one year.]	

8. ILLEGAL DRUGS/DRUG PARAPHERNALIA/CONTROLLED SUBSTANCES [See DPM Supplement 792-3, Subchapter 8. USDA will <u>not</u> initiate disciplinary action when an employee –(1) Voluntarily admits drug use to appropriate supervisors or management officials before being identified through other means. (2) Obtains and completes counseling and rehabilitation through Employee Counseling Services Program (ECSP). (3) Thereafter refrains from illegal drug use. In <u>all</u> other circumstances, agencies must make appropriate referrals to the ECSP <u>and</u> initiate appropriate disciplinary action.]		

a. Possession of an illegal drug, drug paraphernalia, or unauthorized controlled substance while on duty, on Government property or Government-controlled property, or on premises where official duties are performed.	5-Day Suspension to Removal	Removal
b. Use of an illegal drug or unauthorized controlled substance while on duty, on Government property or Government-controlled property, or on premises where official duties are performed.	14-Day Suspension to Removal	Removal

c. Reporting to or being on duty while under the influence of an illegal drug or unauthorized controlled substance.	14-Day Suspension to Removal	Removal
d. Sale or distribution of an illegal drug or controlled substance.	Removal	
e. Operating a Government-owned or Government-leased vehicle (or privately-owned vehicle on official business) while under the influence of an illegal drug.	Removal	

f. Interfering with, or refusing or failing to submit to a properly ordered or authorized drug test, including substituting, adulterating, or otherwise tampering with urine sample.	Removal	
g. Use of an illegal drug or unauthorized controlled substance during non-duty hours and on non-work premises.	Letter of Reprimand to Removal	Removal
9. PROHIBITED POLITICAL ACTIVITY		
Engaging in the types of political activity prohibited by law or by Office of Personnel Management regulations.	Letter of Reprimand to Removal	14-Day Suspension to Removal.

10. SAFETY AND HEALTH VIOLATIONS (Penalty should take into consideration whether danger to persons or property is involved.)		
a. Failure to report an accident and/or injury as required.	Letter of Reprimand to 14-Day Suspension	14-Day Suspension to Removal
b. Failure or refusal to wear/use required protective equipment (e.g., seat belts, earplugs, eye protection, etc.)	Letter of Reprimand to 14-Day Suspension	14-Day Suspension to Removal
c. Operation of a Government-owned or Government-leased vehicle (or privately-owned vehicle while on official business) without an appropriate State driver's license.	5-Day Suspension to Removal	Removal

d. Failure or refusal to observe and/or enforce Safety and Health regulations or to perform duties in a safe manner.	Letter of Reprimand to Removal	5-Day Suspension to Removal
11. DISCRIMINATORY PRACTICES (Penalty should take into consideration whether violation is willful-deliberate, or careless/negligent.)		

a. Acting or failing to act on an official matter (including a personnel action) in a manner which improperly takes into consideration an individual's political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition. [This includes discrimination for or against any employee or applicant for employment prohibited by 42 U.S.C. 2000e-16; 29 U.S.C. 631 or 633a; 29 U.S.C. 206(d); 29 U.S.C. 791; or re any other law, rule o	5-Day Suspension to Removal	Removal

b. Any reprisal or retaliation action against an individual involved in the EEO complaint process	5-Day Suspension to Removal	Removal
c. Use of remarks which relate to and insult or denigrate an individual's race, color, religion, national origin, sex, marital status, age, or handicapping condition.	Letter of Reprimand to 5-Day Suspension	5-Day Suspension to Removal
d. Negligence or insensitivity to an individual's race, color, religion, national origin, sex, marital status, age, or handicapping condition which is determined to be discriminatory and where here is no other finding of overt discrimination .	Letter of Reprimand to 3-Day Suspension	5- Day Suspension to Removal

e. Failure to take appropriate action regarding allegations or findings of discriminatory practices.	5-Day Suspension to Removal	Removal

12. SEXUAL MISCONDUCT

a. Actual or attempted sexual assault (e.g., rape)	Removal	
b. Inappropriate and/or unwelcome touching or other physical contact.	14-Day Suspension to Removal	30-Day Suspension to Removal

c. Pressure for (or official action based on) sexual factors, including taking action favorable o an employee because of the granting of a sexual favor or denying an action favorable to an employee because of the withholding of a sexual favor	30-Day Suspension to Removal	Removal

d. Inappropriate and/or unwelcome teasing, jokes, actions, gestures, display of visual material of a sexual nature or remarks of a sexual nature	Letter of Reprimand o 30-Day Suspension	14-Day Suspension to Removal

13. POHIBITED PERSONNEL PRACTICES (Not elsewhere covered.)

Abuse of authority and commission of a prohibited personnel practice covered by U.S.C. 2302.	Letter of Reprimand to Removal	Removal

Relevant Part of Decision on "Charge"

United States of America
Merit Systems Protection Board

NAOMI RILEY, Appellant, v. DEPARTMENT OF THE ARMY, Agency.	Docket number PH07529110021 Date: Apr 28 1992

Naomi Riley, Eatontown, New Jersey, pro se.
Captain Shelley Econom, Fort Monmouth, New Jersey, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has petitioned for review of an initial decision, issued January 4, 1991, that sustained the agency's removal action. For the reasons discussed below, we GRANT the appellant's petition under 5 C.F.R. 1201.115,AFFIRM the initial decision IN PART, and REVERSE the initial decision IN PART. The agency's removal action is NOT SUSTAINED. The administrative judge erred in sustaining a charge of failure to follow leave procedures.

The administrative judge stated that the appellant was charged with two offenses, AWOL and "fail(ing) to follow written instructions concerning the proper method for requesting approved

leave." Initial Decision at 9. We find the administrative judge's characterization of the second charge unsupported by an examination of the agency's notice of proposed removal, which stated in pertinent part:

> 1. ... Your removal is proposed for your absence without leave (AWOL) beginning 11June 1990 through the present [July 3, 1990]and failure to follow written instructions.
>
> 2. The specific reasons in support of this proposed removal are as follows:
>
> a. beginning 11 June 1990, to date, you have not returned to duty, nor have you requested or received approved leave. Effective 4 through 8 June 1990, you were suspended for absence without leave (AWOL). In the notice of decision-suspension, paragraph 3, you were specifically instructed to return to duty on 11 June 1990, and that future incidents of misconduct might form the basis for a more sever disciplinary action. IAF, Tab 5, Subtab 4g.

Although the proposal notice alleges that the appellant did not request or receive approved leave, it makes this allegation only as support for the two charges in paragraph one, AWOL and failure to follow written instructions, not as a separate charge of failing to comply with the

agency's leave procedures. The only "written instruction" that the appellant is alleged to have failed to follow is the instruction to return to work on June 11, 1990.

The Board must review an agency's decision on an adverse action solely on the grounds invoked by the agency; it may not substitute what it considers to be a more adequate or proper basis. *Gottlied b. Veterans Administration*, 39 M.S.P.R. 606, 609, (1989). Because we find that the agency did not separately charge the appellant with failing to follow written instructions concerning the proper method for requesting approved leave, we conclude that the administrative judge erred in sustaining such a charge. Regarding the written instruction that the agency did charge the appellant with failing to obey – the instruction to return to work on June 11, 1991 – we find that this charge cannot be sustained because, as discussed below, the appellant was incapacitated for duty on that date.

4 April 2006

To whom it may concern:

My name is Artimese Epps, and I am employed at the National Finance Center in New Orleans Louisiana. I am writing this letter in behalf of Donald Lewis who also works at the National Finance Center. I have known Donald Lewis since I came to work at the center. In December 1991 Donald Lewis as NFC Lead Timekeeper selected me. At this time he was the supervisory Labor Relations and was my supervisor from the date of my employment until 1996.
Donald Lewis has provided me with an excerpt from a statement made by Patricia Bachemin, an Equal Employment Opportunity and Workforce services staff member whom he supervise. The specific statement made by this EEO Specialist is "I **have seen Mr. Lewis on two occasions accept pralines (home made candy) from Artimese Epps, who is the class agent for the class action suit against NFC**". I resent and deny this accusation made by this EEO specialist.
Here are some facts on the pralines. Donald Lewis did not "accept pralines" from me at any time. The first occasion he purchased 2 or 3 pieces of praline from me was when he saw me delivering a bag of praline to Julie Nguyen and called me into his office and asked what I had in the brown bag. I told him I was delivering Julie's order of pecan candy to her. I also told him I was raising money to donate to a cancer employee at the NFC who

was on leave without pay. I mention to him that I had two extra bags and asked him to buy a bag, which consisted of 2 or 3 pieces of pecan candy. Patricia Bachemin was no near or in Mr. Lewis office at that time or while I was there. The other occasion Mr. Lewis purchased candy from me is when I delivered another order to Julie Nguyen and asked her to giver Mr. Lewis a bag (candy inside) because he had not arrived for work. The bag had only 2 or 3 pieces of candy in it. Julie Nguyen frequently ordered large amounts of pecan candy from me are the reason for being in the area.

Each times I delivered candy I was off the clock. My question to Patricia Bachemin, how can you be an EEO Specialst and Lied about candy which is so insufficient to fit your agenda in demeaning and humiliating your supervisor, Donald Lewis? Patricia Bachemin motive becomes clear when she misconstrues the facts and fails to say that Julie Nguyen orders large amount of pecan candy (praline as Patricia called it) from me. In this instance, by making untrue statements about her supervisor, I can only say She is out to harm him because he desired to treat Black employees who had filed an EEO complaint the same, as he would have before filing the complaint.

It appear that Patricia Bachemin attitude toward being an EEO specialist is not sincere or genuine when it comes to Black employees who have filed EEO complaints. She is trying to lie on me, where is the trust? If Patricia Bachemin have lied on me, who else have she lied on to get her way? Can we

have an EEO Specialist lying on others?
I worked under Donald Lewis supervision from December 1991 to approximately 1996.He was fair with all employees under his supervision. His work ethic is being honest and trustworthy. He does believe in hard work by all of his employees and he works just as hard. He has spend many hours off the clock working to make sure his office is up to par. When he was assigned to open the Workforce Service, and later Equal Employment Opportunity, employees who had worked for him or with him asked to work for him, if he was not a good supervisor do you think his old employees would want to follow him? Adimu Kushindana is one of those employees who worked under Donald Lewis prior to becoming a member of his present staff. I personal have the utmost respect for Donald Lewis as a professional, also manager, and supervisor.
I think Patricia Bachermin and others are out to get Donald Lewis, and in doing so by lying. This is abusing government time and funds. Because Patricia Bachemin has lied about me, I will never be able to trust her or the system she work under.
The above statements made by me (Artimese Epps) are true.
Sincerely,
Arimese A. Epps
/S/

May 29, 2008

Paul R. Michel
Chief Judge
United States Court of Appeals
For the Federal Circuit
717 Madison Place, NW
Washington, D.C. 20439

Re: Donald R. Lewis v.
Department of Agriculture
Docket No. 2008-3031

Honorable Chief Judge Michel:

During the week of May 19, 2008, I called the Clerk of Court's office and spoke with a Deputy Assistant Ann on a matter of a question/statement that had been presented to me when I returned the Court's call about some case decisions on April 18, 2008, a Court personnel by the name James Benjamin began stating/asking me repeatedly out of the "blue", "you can retire can't you?" This was repeated more than 3 times. While not saying anything for a while. I did eventually respond that the agency removed me 34 days after I returned to the facility in New Orleans, Louisiana after Hurricane Katrina; that a person need to prepare to retire. It bothered me that this statement/question was being put to me about retirement when I had come to the Court seeking a fair and just review of my case, not on retirement. I gained a feeling that the Court had been discussing retirement eligibility in relation to the decision in my case. It is my position that it was

not fair for the Court to be discussing whether I can retire while my case was before it for a fair and just review. I served 2 years in the U.S. Army by way of the draft during the Vietnam War with an Honorable Discharge and Letter of Appreciation from General William Westmoreland for my war time service. I was not asked then if I could retire. It is now when I ask for a fair and just review of a wrong that I am suffering, the taking away of my right to gain employment after 36 years of Federal Service with an unblemished record and a history of near perfect performance ratings description and RIF. I am hurt that this was put upon me.

Sincerely,

/S/

Donald R. Lewis

Certified Mail No.: 7007 0710 0000 8589 8440

Certificate of Service
I certify that a copy of Petitioner's Letter on use of Retirement was mailed to U.S. Department (May 29, 2008) of Justice on the date of this certificate:

Paul R. Michel U.S. Mail
Chief Judge
United States Court of Appeals
For the Federal Circuit
717 Madison Place, NW
Washington, D.C. 20439

Anuj Vohra U.S. Mail
Trial Attorney
U.S. Department of Justice
Commercial Litigation
1100 L Street, NW, Room 12114
Washington, D.C. 20530

/S/_____ May 31, 2008
Donald R. Lewis Date
Pro Se

No.

In The
Supreme Court of the United States
Donald R. Lewis
Petitioner
Vs.
Department of Agriculture
Respondent
Proof of Service

I, Donald R. Lewis, do wear or declare that on this date, , 2008, as required by Supreme Court Rule 29, I have served the enclosed Petition For A Write of Certiorari on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to third-party commercial carrier for delivery within 3 calendar days.
The names and addresses of those served are as follows:

Supreme Court of the United States.
Office of Clerk
1 First Street, N.E.
Washington, D.C. 20543-0001
Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Avenue, N.W.

Washington, D.C. 20530-001
I declare under penalty of perjury that the foregoing is true and correct.
Executed on , 2008
Donald R. Lewis

Pro se

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Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.

Print your name and address on the reverse so that we can return the card to you.

Attach this card to the back of the mailpiece, or on the front if space permits

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1. Article Addressed to:
Paul R. Michel, Ch Judge
U.S. Court of Appeals For the Federal Circuit
717 Madison Place, NW
Washington, D.C. 20439

Complete this section on delivery
A. Signature
9 Agent
X / S / 9 Addresses
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9 No

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No. 08-128

In the
Supreme Court of the United States

Donald R. Lewis
Petitioner

Vs.

Department of Agriculture
Respondent

On Petition for Rehearing of Petition for
Writ of Certiorari

Donald R. Lewis
Pro Se

P.O. Box 1142
Kirbyville, TX 75956
(409) 423-2799

Questions Presented

1. When an employee retire with an effective date the same as the date of removal is the employee separated by retirement as in Mays v. Department of Transportation, 27F.3d 1577 (1994); Drumheller v. Department of Army, 55 MSPR 441 (1992); 5 USC Section 7701? Should the employee be provided a notification of Personnel Action, Standard Form 50 (SF-50), of the personnel action?

2. Did the Respondent violate Petitioner's rights to Equal Protection under the Law, Eighth Amendment of the U.S. Constitution, and due process rights by charging him four (4) times out of the six with negligence or unintentional conduct and then applying the element of intent for each charge in reaching the penalty of removal in violation of Alvarodo v. Department of the Air Force, 103 MSPR 1 (2006); Edmound C. Broussard v. Department of Navy, 27 MSPR 382 (1985)? Has the tribunals committed the same violations and abused their discretion in failing to find such violations?

3. Has Petitioner been wrongfully deprived of fair and just reviews of threats, wrongful actions, and consideration of retirement contrary to the intent of Congress, the House Committee Report, and 5 USC Section 7701? Has the tribunals committed the same violations and abused their discretion in failing to find such violations?

4. Did the Respondent fail to follow its table of penalties with out showing that the deviations were justified by the circumstances of the case in violation of Williams v. Department of the Air Force, 32 MSPR 347 (1987)? Did the tribunals abuse their discretion and failed

to provide Petitioner with Equal Protection of the Law when they failed to find violations?

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Donald R. Lewis V. Department of Agriculture, 2008-3031, March 7, 2008, United States Court of Appeals For The Federal Circuit, Decision

Donald R. Lewis v. Department of Agriculture, Docket Number DA-0752-06-0686-1-1, October 3, 2007, Merit Systems Protection Board, Final Order

Donald R. Lewis v. Department of Agriculture, Docket Number DA-0751-06-0686-1-1, May 10, 2007, Merit Systems Protection Board, Initial Decision

Donald R. Lewis v. Department of Agriculture, 2008-3031, May 1, 2008, Order of the United States Court of Appeals For The Federal Circuit denying Petition For Rehearing

Petition for Writ of Certiorari denied October 6, 2008, 2008, No. 08-128

Jurisdiction

The date on which the United States Court of Appeals For The Federal Circuit decided my case was March 7, 2008. Appendix A, presented July 25, 2008.

A timely petition for rehearing was denied by the United States Court of Appeals For the Federal Circuit on the following date: May 1, 2008, and a copy of the order denying rehearing appears as Appendix D, presented July 25, 2008.

Petition for Writ of Certiorari denied October 6, 2008.

The Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

Statement of The Case

The Petitioner entered Federal employment in 1971 as a Labor Management Relations Examiner with the National Labor Relations Board. In February 1989, he transferred to the U.S. Department of Agriculture, National Finance Center (NFC), in New Orleans, Louisiana as a GS-12 Supervisory Labor Relations Specialist, up graded to GS-13. In 1977, former NFC Director John Ortego selected Petitioner to design, develop, and manage what later became knows as the Equal Employment Opportunity and Workforce Services Staff (EEOWSS), due to a crisis of employment environment issues. See Appendix F.

In the position as manager, Petitioner almost single-handedly changed the employment environment of the Agency from one that had become nationally known for its poor employment environment to one nationally recognized for its model employment environment. He won national awards and recognition for himself and the Respondent, including such awards as the Office of Personnel Management Director's Award and the USDA's Secretary's Award for operating an efficient, effective, and discrimination free organization. See Appendix F. Petitioner is the only manger of EEO or EEOWSS programs for the Respondent to have won such awards for himself and the programs. He became knows as one of the most innovative and achieving EEO managers in the Federal Government. Prior to the charges in the within matter, Petitioner, in his over 36 year employment history with the Federal Government, had never been the subject of any disciplinary action. His performance was always at the Outstanding or Superior levels, with his last performance rating at the Outstanding

level. He served 2 years in the U.S. Army by way of the draft during the Vietnam War with an Honorable Discharge and Letter of Appreciation from General William Westmoreland for his war time service. The investigation and charges were instigated and orchestrated by one employee using it to get a promotion (Patricia Bachemin), and another employee (J. Nguyen), and her friends, who wanted the ultimate decision making responsibility to determine who would be included in the reduction-in-force (RIF). In February 2005, Bachemin actually went to the deciding official and sought two things: (1) a promotion, and (2) Petitioner's termination. She received both. The Agency refuses to present her at the hearing so that she could be examined by Petitioner. Virginia Gaye Cook, Head of Operations and Agency Misconduct Investigation Coordinator, prepared and sent a promotion position description to Petitioner for promotion of Bachemin that was fraudulent. By regulation and practice, Petitioner should have been the preparer of the position description. Cook became upset when Petitioner refused to sign the fraudulent position description. Bachemin was promoted shortly after Petitioner's proposed removal and administrative leave. The refusal of the Board and Appeal Court to address the position description and the Seavello issues deprived Petitioner of due process, equal protection of the law, and of protection against a prohibited personnel practice. Kushindana, a friend of J. Nguyen, told Petition that if he followed through with J. Nguyen being impacted by the RIF instead of M. Nguyen, that he could expect to have problems from her and others in the office. On August 3, 2005, Kushindana told Petitioner that since it appeared that he wasn't going to leave, she was going to have to run him off. See Appendix H. Only 16 days later, August 19, 2005, the Investigator who had been operating

in collusion with Kashindana, Bachemin, J Nguyen, and others, told Petitioner at the opening of his initial interview, "You ought to be out of her" and that he should be retired. Given the Investigator's conduct and gross procedural violations, it is Petitioner's position that the Investigator was hired to build a case for his removal.

Cook, arranged for Petitioner to be investigated by a contract investigator with whom she has close ties. The Investigator was instructed to investigate Petitioner for a period spanning over 40 years including years before his employment by the Federal Government. The charges were vague and non-specific as to when and what Petitioner allegedly did and denied his due process rights. When Petitioner could not agree with the conclusory comments under the charges on employees' weight, he was charged with making false statements during an official investigation. The investigator violated every provision of the procedural guidelines for investigation dated March 24, 2003 which states that "Investigators **should** avoid personal opinions, or conclusions, and **should not** make disciplinary recommendations a part of the report." See Appendix E. The Investigator violated these provisions and thereby denied Petitioner due process and equal protection under the law. This caused substantial prejudice to Petitioner's individual rights by affecting the agency's decision.

The Appeal Court and tribunals below failed to find harmful procedural error even though it is clear that the Respondent violated its own procedural guidelines in the investigation of Petitioner and in the use of the Report of Investigation in reaching the penalty decision to remove Petitioner. The Appeal Court and tribunal below violated Petitioner's Due Process Rights, First

Amendment of the U.S. Constitution, and Equal Protection Under The Law in their findings on Petitioner being provided conclusory statements rather than requested needed specifics such as descriptive details of alleged conclusory comments, dates, times, and places of alleged inappropriate comments, and the finding of Petitioner's inability to agree with the vague, conclusory, and non-specific charges as making false statements during an official investigation. They changed the charge on "directing" after the hearing and grossly misdescribed employees on the issue and their relationship with Petitioner. The Appeal Court and tribunals below upheld Respondent's charging Petitioner with unintentional/negligence and then applying the element of intent for the same charges by sustaining the Penalty of Removal on the basis of intent. See Edmound C. Broussard v. Department of Navy, 27 MSPR 382 (1985), wherein the Agency charged the Appellant with negligence but **improperly** removed him based on the element of intent. The Board and Appeal Court accepted the Respondent's use of conclusory, boiler plate language on penalty without a balanced and reasoned discussion of all relevant and mitigating factors. The table of penalties was not honestly considered.

When it became clear to Petitioner that the Respondent and this particular group of employees were determined to destroy him, Petitioner sought and received favorable consideration for employment by two other Federal agencies. One Agency offered Petitioner a position and he accepted. However, one day after the agency contacted the Respondent for transfer of Petitioner, the offer was withdrawn. When the other agency contacted Respondent for reference on Petitioner, the agency stopped their process of consideration. It

became clear to Petitioner at this point that the Respondent was interested in destroying Petitioner and not just removing him.

On August 29, 2005, Hurricane Katrina made landfall in New Orleans, Louisiana, and Petitioner evacuated. On February 22, 2006, Petitioner returned to New Orleans and Respondent facilities. On March 28, 2006, 34 days after Petitioner's return Respondent issued Petitioner a proposed removal letter and place him on administrative leave. Effective September 16, 2006, Petitioner was removed.

On April 18, 2008, during a return call to the Appeal Court on a request to submit copies of case decisions, and Appeal Court personnel began stating/asking Petitioner repeatedly out of the "blue", "you can retire can't you?" This placed Petitioner on notice that the Appeal Court had considered retirement eligibility when making a decision in his case. Petitioner has never raised an issue of retirement eligibility with any tribunal considering his case. See Appendix O.

The Appeal Court states on page 6 of its decision that Byrne's affidavit stated that she learned of the contract employee's conduct from another employee to whom I, J. Nguyen and Kushindana had complained. This is not Byrne's affidavit, The Appeal Court states on page 8 of their decision that "Mr. Lewis acknowledged that on at least one occasion he picked up one copy of Ms. Nguyen faxes and delivered it to her." There is no evidence in the record that Petitioner ever made such acknowledgement. On page 49 of the Board decision, the AJ states "The record further reflects that M. Nguyen's non-work related activities continued into August 2005."

Not true and not in the record. M. Nguyen was not in America from July 26, 2005, through August 26, 2005. She was on administrative leave from August 26, 2005, through November 14, 2005, due to Hurricane Katrina. The stating that such matters are in evidence in the record is an error, an abuse of discretion, and harm Petitioner by taking away his property interest in his employment.

After notice of Respondent's removal decision, Petitioner retired with an effective date of September 16, 2006, the same date of the removal notice. When an employee retire on the effective date of his/her removal, the employee is actually separated by retirement. Mays v. Department of Transportation, 27 F.3d 577 (1994); Drumheller v. Department of Army, 55 MSPR 441 (1992); 5 USC Section 7701. Petitioner has never received a Notification of Personnel Action, Standard Form 50 (SF-50) for his retirement.

Reasons For Granting The Petitioner
For Rehearing

When an employee retire on the effective date of his/her removal, the employee is actually separated by retirement, Mays v. Department of Transportation, 27 F.3d 1577 (1994); Drumheller v. Department of Army, 55 MSPR 441 (1992); 5 USC Section 7701. After notice of the Respondent's decision, Petitioner retired with an effective date of September 16, 2006, the same date of the removal notice. Petitioner has never received a Notification of Personnel Action, Standard Form 50 (SF-50), for his retirement. This failure has been continuous to the present. These are intervening circumstances of substantial and controlling effect not previously presented to this Court. See also Tracy P. Nguyen v. Department of the Navy, MSPR (1999), Docket Number DC-0752-98-0850-E-1, whercin mootness resulted. Mootness can arise at any stage of litigation.

This has harmed Petitioner in his ability to seek employment in the same manner as the Respondent harmed Petitioner when he sought and received one position and favorable consideration for another after it became clear to him that Respondent was out to destroy him.

5 USC Section 7701 supports that retirement should never have been a factor in the United States Court of Appeals For the Federal Circuits decision in this case. The U.S. Court of Appeals for the Federal Circuits personnel stating to Petitioner that retirement eligibility was taken into consideration in the decision in his case violates the United States Code and Congress intent. The House Committee Report supports an employee's right to

have separation as retirement under circumstances faced by Petitioner.

Petitioner's employment rights, and right to gain employment has been wrongfully taken away with no place to go for a fair and just review. Notwithstanding his honorable service as a draftee in the U.S. Army for war time service and Outstanding service as a civilian, he is not accorded fundamental and basic rights accorded other U.S. citizens in the above cited cases and in other cases cited to the Court earlier in this process.

In addition to the wrongful charging of Petitioner with negligent or unintentional conduct in charge 1 (Receipt of government funds without securing required management approval) and then wrongfully using intent on this charge to reach the penalty of removal, Petitioner suffered other substantial grounds of being charged with negligent or unintentional conduct and then punished with the element of intent in the penalty. Specifically, Petitioner was charged with Failure to take appropriate management action (Charge 2), allowing subordinate employees to conduct private business for personal gain using government time and equipment (Charge 3), and Inappropriate management and personal conduct (Charge 5), and then punished with the element of intent in the penalty. These are substantial and controlling grounds not previously presented. In Alvarado v. Department of the Air Force, 103 MSPR 1 (2006) the Board stated that where an agency charges an appellant in a manner that requires the agency to prove that the appellant's actions were willful and intentional, proof that the appellant's actions were negligent or unintentional will not suffice. Petitioner begs the Court to afford him the same rights and protection of citizens of the United States. He is a

citizen. He was born in America and served this country honorably by way of the draft in the U.S. Army during the Vietnam War. All he wants is his name cleared so that he can go forward to seek employment else where. The law as set forth in Mays, supra; Drumheller, supra; 5 USC Section 7701; and Alvardo, supra, should be accorded Petitioner. In their closing brief, the agency expressly stated that when considering penalty the Deciding Official considered Petitioner's conduct for the above identified charges as "deliberate" and "malicious", terms that require intent to be proven when Petitioner was in fact charged with unintentional or negligent. To allow Respondent to subject Petitioner to the penalty and punishment level of intent without charging him with such for four or more charges is a substantial abuse of discretion and denial of Equal Protection of the Law. The accumulative gross wrongful application of these unintentional/negligent charges to the penalty as intent has harmed Petitioner, denied him Equal Protection of the Law and Due Process. See also Edmound C. Broussard v. Department of Navy, 27 MSPR 382 (1985).

The agency's failure to follow its table of penalties is substantial and was not previously presented to this Court. Where the agency has a table of penalties it must adhere to the guidelines in the table unless it can show that deviation from the suggested penalty is justified by the circumstances of the case. Williams v. Department of the Air Force, 32 MSPR 347 (1987). As can be gleamed from the table provided earlier in this process, the table was not followed for any charge and the deviation was not justified by the circumstances of the case.

Conclusion

This petition for rehearing should be granted. Intervening circumstances of a substantial and controlling effect exist and substantial grounds not previously presented are set forth. Petitioner retired on the effective date of Respondent's removal action in hope that the law would apply to him as in Mays, supra. Respondent's motive to get rid of Petitioner was accomplished with the effective date of his retirement (September 16, 2006). The matter was moot except for Respondent's motive to go farther and destroy Petitioner. The law is clear. When an employee retire on the effective date of his/her removal, the employee is actually separated by retirement. See also the United States Code, Section 7701, the House Committee Report, and Congress intent. Additionally see Drumheller, supra, Mays, supra, and the United States Code cited therein. Petitioner has been harmed by this failure to apply the law. Petitioner has been a good and outstanding citizen of this country by all accounts. Despite the denial of rights and protections, many by State action, including the denial of use of facilities and at one point in time in grade school being without a school to attend, Petitioner has gone forward in life and remained an honorable citizen. The announcement of threats to harm Petitioner and run him off from his employment where he served at the Outstanding level has continuously been ignored by all tribunals. Neither Petitioner or any other citizen should be denied protection from such threats and actions.

From Petitioner's separation by retirement to the present, Respondent has failed to provide him with notification of Personnel Action, form SF-50, noting such. Respondent's motive for harming Petitioner in his efforts

to go forward in life and gain other employment has to be noted by this Court. Petitioner's long,

honorable, and discipline free employment with continuous high performance should be weighed by this Court in any analysis and decision.

Donald R. Lewis
Pro Se

Date: 10/24/08

In The
Supreme Court of the United States

Donald R. Lewis
Petitioner

Vs.

Department of Agriculture
Respondent

Petitioner certifies that the Petition for Rehearing of Denial of Writ of Certiorari is restricted to the grounds limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented. Not for delay,

I declare under penalty of perjury that the foregoing is true and correct.

Donald R. Lewis

Donald R. Lewis
Pro Se

Date: 10/24/08